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# No Good Deed Goes Unpunished: Potential Lender Liability for Paycheck Protection Program Lenders

## I. INTRODUCTION

Following a decade of economic growth,<sup>1</sup> the United States is in the midst of yet another financial crisis.<sup>2</sup> But this financial crisis is far different from the previous ones.<sup>3</sup> Indeed, it is the result of a once-in-a-century pandemic.<sup>4</sup> This pandemic, caused by the rapid spread of COVID-19,<sup>5</sup> has wreaked havoc on the global economy and uprooted the lives of billions of people.<sup>6</sup>

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1. See *Chart Book: Tracking the Post-Great Recession Economy*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 9, 2020), <https://www.cbpp.org/research/economy/chart-book-tracking-the-post-great-recession-economy> [https://perma.cc/W3ZK-MLMF] (tracking United States economic growth between 2009 and early 2020).

2. See *id.* (analyzing the early effects of the COVID-19 pandemic on the U.S. economy).

3. See Louise Sheiner, *How Does the Coronavirus Pandemic Compare to the Great Recession, and What Should Fiscal Policy Do Now?*, BROOKINGS INST. (Mar. 12, 2020), <https://www.brookings.edu/blog/up-front/2020/03/12/how-does-the-coronavirus-pandemic-compare-to-the-great-recession-and-what-should-fiscal-policy-do-now/> [https://perma.cc/VZ48-HJKE] (contrasting the 2020 Financial Crisis from the 2008 Financial Crisis”).

4. See Bill Gates, *Responding to Covid-19—A Once-in-a-Century Pandemic?*, NEW ENG. J. MED. (Apr. 30, 2020), <https://www.nejm.org/doi/full/10.1056/nejmp2003762> [https://perma.cc/72G7-NM93] (describing the arguments of global health experts who believed “that another pandemic whose speed and severity rivaled those of the 1918 influenza epidemic was a matter not of *if* but of *when*”).

5. Kathryn Reid, *What is the Coronavirus? Facts, Symptoms, and How to Help*, WORLD VISION (Sept. 10, 2020), <https://www.worldvision.org/disaster-relief-news-stories/what-is-coronavirus-facts> [https://perma.cc/FWZ7-XSCR].

6. See Alexander Chudik, *Economic Consequences of Covid-19: A Counterfactual Multi-Country Analysis*, VoxEU (Oct. 2020), <https://voxeu.org/article/economic-consequences-covid-19-multi-country-analysis> [https://perma.cc/2B3W-5SQN] (concluding that COVID-19 has caused a global recession that will be very long lasting).

COVID-19 has been particularly harmful for the U.S. economy.<sup>7</sup> As the virus began to spread rapidly around the United States,<sup>8</sup> states responded by implementing stay-at-home orders<sup>9</sup> to curb its spread.<sup>10</sup> These stay-at-home orders affected the economy more sharply in three months of the pandemic than in the two years of the 2008 Financial Crisis.<sup>11</sup> While various parts of the economy were impacted differently,<sup>12</sup> one thing was clear—Americans needed help quickly.<sup>13</sup>

Therefore, Congress passed new legislation to help Americans during this financial crisis.<sup>14</sup> Congress passed the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)<sup>15</sup> two weeks after

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7. See generally Robert Fairle, *The Impact of Covid-19 on Small Business Owners: Evidence of Early Stage Losses from the April 2020 Current Population Survey*, 1–2 (Stanford Inst. for Econ. Policy and Research, Working Paper No. 20-022, 2020), <https://siepr.stanford.edu/sites/default/files/publications/20-022.pdf> [<https://perma.cc/WR4H-R375>] (providing an early account of the effects of COVID-19 on the United States).

8. See Anne Schuchat, *Public Health Response to the Initiation and Spread of Pandemic COVID-19 in the United States, February 24–April 21, 2020*, MORBIDITY AND MORTALITY WEEKLY REP. 551, 551 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6918e2-H.pdf> [<https://perma.cc/PX26-C5FQ>] (analyzing the spread of COVID-19 from Wuhan, China to the rest of the world, focusing on the rapid spread of the virus in the United States).

9. See, e.g., N.C. Exec. Order No. 121 (Mar. 27, 2020) (declaring that “all individuals currently in the State of North Carolina are ordered to stay at home”); Va. Exec. Order No. 53 (Mar. 30, 2020) (declaring the closure of most businesses and public gatherings).

10. See Amanda Moreland, *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement — United States, March 1–May 31, 2020*, MORBIDITY AND MORTALITY WEEKLY REP. 1198–1202 (2020), <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6935a2-H.pdf> [<https://perma.cc/KJB3-YQWE>] (describing the population movement across the United States before and after states put stay-at-home orders into effect).

11. Rakesh Kochhar, *Unemployment Rose Higher in Three Months of COVID-19 Than it did in Two Years of the Great Recession*, PEW RES. CTR. (June 11, 2020) <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/> [<https://perma.cc/FFF8-Q2JV>].

12. Mark Muro, *The Places a COVID-19 Recession Will Likely Hit Hardest*, BROOKINGS INST. (March 17, 2020), <https://www.brookings.edu/blog/the-avenue/2020/03/17/the-places-a-covid-19-recession-will-likely-hit-hardest/> [<https://perma.cc/8UUE-HYDE>].

13. See Fairle, *supra* note 7 (detailing the plummeting of small businesses in the United States following the stay-at-home orders implemented in response to COVID-19).

14. See Nick Schwellenbach, *The First 100 Days of the U.S. Government’s COVID-19 Response*, POGO.ORG (May 6, 2020), <https://www.pogo.org/analysis/2020/05/the-first-100-days-of-the-u-s-governments-covid-19-response/> [<https://perma.cc/CEZ4-HGN7>] (providing a detailed timeline of the first 100 days of the U.S. government’s response to the COVID-19 pandemic).

15. Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) § 1102, 15 U.S.C.A. § 636(a)(36) (West 2021).

former President Donald Trump declared COVID-19 a national emergency.<sup>16</sup> Included among the many provisions of the CARES Act was an emergency loan program known as the Paycheck Protection Program (“PPP”).<sup>17</sup> The PPP was designed to help businesses that were affected the most by the pandemic.<sup>18</sup> The CARES Act allocated the most money for an emergency relief program in U.S. history—over \$2 trillion toward its emergency relief efforts,<sup>19</sup> with initially \$659 billion allocated toward the PPP.<sup>20</sup> Lenders were in charge of processing PPP loan applications and servicing the loans, and ultimately many lenders across the country began to participate.<sup>21</sup> After administering loans for several months, the second round of the PPP concluded on August 8, 2020.<sup>22</sup>

Congress then added a third round of PPP funding under the Consolidated Appropriations Act of 2021 (“Relief Act”).<sup>23</sup> This Act went

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16. See Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020) (“NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 201 and 301 of the National Emergencies Act (50 U.S.C. 1601 et seq.) and consistent with section 1135 of the Social Security Act (SSA), as amended (42 U.S.C. 1320b-5), do hereby find and proclaim that the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020.”).

17. CARES Act § 1102, § 636(a)(36).

18. See Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20811–12 (Apr. 15, 2020), [https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule\\_0.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf) [<https://perma.cc/X458-EPXB>] (explaining the general purpose of the Paycheck Protection Program).

19. Erica Werner, *Trump Signs \$2 Trillion Coronavirus Bill Into Law as Companies and Households Brace for More Economic Pain*, WASH. POST (Mar. 27, 2020), <https://www.washingtonpost.com/us-policy/2020/03/27/congress-coronavirus-house-vote/> [<https://perma.cc/5T9V-UWKR>].

20. *The CARES Act Provides Assistance to Small Businesses*, U.S. DEP’T OF TREASURY, <https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses> (last visited September 12, 2020) [<https://perma.cc/X4PP-EZH4>].

21. See SMALL BUS. ADMIN., LENDERS PARTICIPATING IN PPP BY STATE (Apr. 23, 2020), [https://www.sba.gov/sites/default/files/2020-04/Lenders%20participating%20in%20PPP%20by%20State\\_As%20of%2004%2023%2020.pdf](https://www.sba.gov/sites/default/files/2020-04/Lenders%20participating%20in%20PPP%20by%20State_As%20of%2004%2023%2020.pdf) [<https://perma.cc/CA6T-JLPN>] (listing by state hundreds of lenders participating in the PPP).

22. Andy Medici, *SBA’s Paycheck Protection Program Set to Expire Aug. 8*, WASH. BUS. J. (Aug. 6, 2020, 3:48 PM), <https://www.bizjournals.com/washington/news/2020/08/06/sba-ppp-loan-expire-august-deadline.html> [<https://perma.cc/ZGA5-FEER>].

23. Consolidated Appropriations Act of 2021 (“Relief Act”), Pub. L. No. 116–260, 134 Stat. 1182, 1993 (2020) (Westlaw through slip copy of legislation, providing estimated statute at large page numbers because the Statute at Large for this Act has not been released at the time of this Note’s publication).

into effect on December 27, 2020<sup>24</sup> and authorizes lenders to administer PPP loans until March 31, 2021.<sup>25</sup> Small businesses that did not receive a PPP loan the first time are allowed to apply under this new legislation.<sup>26</sup> The Act also created Second Draw Loans for businesses that received an initial PPP loan but need additional funding.<sup>27</sup>

Based on these statutory authorities, the PPP has two competing methods for providing relief to businesses.<sup>28</sup> On one hand, Congress wishes to process PPP loan applications on a first come, first served basis.<sup>29</sup> On the other hand, Congress wishes to administer the PPP loans as fast as possible without an order for processing loan applications.<sup>30</sup>

Satisfying the first goal of processing the PPP loans on a first come, first served basis has been difficult for participating lenders.<sup>31</sup> The difficulty arises because many of the businesses that apply first to PPP lenders are new customers, and banks need to vet new customers who apply for PPP loans.<sup>32</sup> Vetting new customers involves higher costs

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24. Seung Min Kim, *Trump Signs Stimulus and Government Spending Bill into Law, Averting Shutdown*, WASH. POST (Dec. 27, 2020, 9:34 PM), <https://www.washingtonpost.com/us-policy/2020/12/27/trump-stimulus-shutdown-congress/> [<https://perma.cc/GFM7-4RWE>].

25. *See* Relief Act, 134 Stat. at 2019 (amending the CARES Act by substituting March 31, 2021 for August 8, 2020 as the deadline for providing PPP loans).

26. *See id.* (providing sections 301 to 311 that outline the conditions for initial and Second Draw PPP loans).

27. *See id.* (detailing section 311 that creates the PPP Second Draw Loans).

28. *See generally* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20811 (Apr. 15, 2020), [https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule\\_0.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf) [<https://perma.cc/X458-EPXB>] (providing a general overview of the Paycheck Protection Program).

29. *See id.* at 20813 (answering yes to the frequently asked question that the PPP is served on a first-come, first-served basis).

30. *See* Press Release from Maxine Waters, Waters Releases Extended Statement for the Record on the CARES Act (Mar. 31, 2020), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=406468> [<https://perma.cc/PRF4-CRK9>] (describing the involvement of the private sector for PPP lending to administer PPP loans as fast as possible).

31. *See* The Quandary for Banks and Lenders Created by the PPP, MORRIS, MANNING, & MARTIN, LLP (May 18, 2020), <https://www.mmmlaw.com/media/the-quandary-for-banks-and-lenders-created-by-the-ppp/> [<https://perma.cc/HM97-TF7E>] (explaining the litigation that resulted from the alleged failure of PPP lenders to process PPP loans on a first come, first served basis).

32. Under the third round of PPP, however, the Relief Act has made the vetting process easier for PPP loans. *See* Relief Act, 134 Stat. at 1996–97 (providing section 305, which allows PPP lenders to rely on the certification of PPP applicants as long as certain statutory requirements are satisfied).

compared to preexisting customers who have already been vetted for previous loans.<sup>33</sup> Therefore, lenders may avoid vetting costs by processing the applications of preexisting customers first.<sup>34</sup> Avoiding vetting costs satisfies the PPP's second goal of administering PPP loans as fast as possible. Given the competing goals of the PPP, lenders have acted consistently with the second PPP goal but not the first.

Failing to act consistently with the PPP's first goal has caused the public to believe that PPP lenders have acted contrary to Congressional intent.<sup>35</sup> More specifically, there are two groups that feel wronged by PPP lenders.<sup>36</sup> The first group consists of PPP applicants whose loan applications were denied.<sup>37</sup> The denied applicants believe that they were wronged by the PPP lenders because lenders appeared to prioritize lending to preexisting customers although new customers had applied first.<sup>38</sup> The second group consists of third party companies ("agents") that helped successful applicants receive PPP loans but were not paid compensation by PPP lenders.<sup>39</sup> These agents argue that lenders owe

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33. See Amara Omeokwe & Ryan Tracy, *Treasury Department Encouraged Banks to Prioritize Existing Customers for PPP Loans, House Panel Says*, Wall St. J. (Oct. 16, 2020, 5:52 PM), <https://www.wsj.com/articles/treasury-department-encouraged-banks-to-prioritize-existing-customers-for-ppp-loans-democratic-report-says-11602861336> [<https://perma.cc/P7LV-NPRB>] (explaining that PPP lenders prioritized preexisting customers at first because the lenders already had the information of those customers, which made administering PPP loans easier).

34. *C.f. id.* (providing the conclusion of a House oversight committee which stated that the Department of Treasury encouraged PPP lenders to process the PPP loan applications for preexisting customers first because doing so would save costs and allow the program to run quicker).

35. See, e.g., Complaint for Plaintiff at 29-31, *Sha-Poppin Gourmet Popcorn, LLC v. JPMorgan Chase Bank, N.D. Ill.* (2020) (No. 1:20-cv-02523) ("As a result of Defendants' actions, Sha-Poppin is now at a severe risk of having to lay off its employees and shutter its business—the very result Congress sought to avoid in creating a first-come, first-served loan program to be deployed by SBA banking partners with all deliberate speed. At minimum, Sha-Poppin lost out on \$19,000 in PPP loan funds it would have otherwise received, but for Defendants' misconduct.").

36. See Robert Carothers & Graham Ryan, *Litigation and Regulatory Risks to Banks from Paycheck Protection Program*, NAT'L L. REV. (May 21, 2020), <https://www.natlawreview.com/article/litigation-and-regulatory-risks-to-banks-paycheck-protection-program> [<https://perma.cc/AZ37-RPVD>] (outlining the different types of litigation risks affecting PPP lenders).

37. See *id.* (providing one example of a litigation risk affecting PPP lenders as lawsuits brought by denied PPP applicants who believe that lenders prioritized preexisting, larger customers).

38. See *id.* (listing multiple reasons for why denied applicants feel wronged by PPP lenders).

39. *Id.*

them compensation<sup>40</sup> because Small Business Administration (“SBA”) regulations expressly impose this requirement.<sup>41</sup>

Both groups believed that their only recourse was through the courts.<sup>42</sup> As such, both groups have brought class action lawsuits against PPP lenders.<sup>43</sup> The denied applicants and agents initially brought unsuccessful claims under the theory that some PPP lenders violated the CARES Act.<sup>44</sup> Courts did not accept this argument because they held that there is no private right of action under the CARES Act.<sup>45</sup> In other words, denied applicants and agents cannot sue lenders even if the lenders are proven to have violated the CARES Act.<sup>46</sup> Because neither group may sue under this legislation, they turned to theories of recovery under common law.<sup>47</sup> More specifically, both groups have brought claims grounded in common law theories in tort and contract law.<sup>48</sup> For these reasons, banks are potentially exposed to lender liability.<sup>49</sup>

Understanding the risk of lender liability is important for PPP lenders going forward. If lenders are found liable at common law, courts

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40. *Id.*

41. See Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20816 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120), [https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule\\_0.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf) [<https://perma.cc/X458-EPXB>] (“Agent fees will be paid by the lender out of the fees the lender receives from SBA . . . One (1) percent for loans of not more than \$350,000; 0.50 percent for loans of more than \$350,000 and less than \$2 million; and 0.25 percent for loans of at least \$2 million.”).

42. See, e.g., Complaint for Plaintiff at 29-31, *Sha-Poppin Gourmet Popcorn, LLC v. JPMorgan Chase Bank*, N.D. Ill. (2020) (No. 1:20-cv-02523) (lawsuit by denied applicants).

43. See, e.g., Complaint for Plaintiff at 7, *Panda Group, PC v. Bank of America*, C.D. Utah (2020) (No. 4:20-cv-00045-DN) (providing an example of a class action complaint brought by a group of agents).

44. See, e.g., *Profiles, Inc. v. Bank of America Corp.*, 453 F. Supp. 3d 742, 751 (D. Md. Apr. 13, 2020) (dismissing claim that PPP lenders violated the CARES Act because Congress did not intend a private right of action).

45. *Id.*

46. See Caroline Bermeo, *Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied From a Federal Statute*, 49 LOYOLA U. CHI. L.J. 117, 120 (2017) (defining private right of action as when a private plaintiff can bring an action directly under a federal statute).

47. See Robert Travisano, *No Quarter for PPP Lenders*, NAT’L L. REV. (June 8, 2020), <https://www.natlawreview.com/article/no-quarter-ppp-lenders> [<https://perma.cc/NXM5-362P>] (listing negligence, common law fraud, and unjust enrichment as examples of theories of recovery under common law that plaintiffs are bringing against PPP lenders).

48. *Id.*

49. See *id.* (listing the ongoing lawsuits against PPP lenders stemming from common law violations).



will require them to pay large amounts in damages to borrowers,<sup>50</sup> contributing to the decreased revenue which lenders already expect from servicing PPP loans.<sup>51</sup> Lenders may then become discouraged from participating in future government loan programs.<sup>52</sup> Accordingly, understanding the current risk of lender liability helps define the reasonable standard of conduct for PPP lenders, providing confidence to lenders wishing to participate in future government loan programs.

Proceeding in five parts, this Note examines the potential lender liability for banks participating in the PPP and argues that banks ultimately face a low likelihood of liability. Part II provides a brief overview of the PPP and the role of banks within that program.<sup>53</sup> Part III explains the liability that results from servicing PPP loans.<sup>54</sup> Part IV assesses the likelihood of lender liability for lenders participating in the PPP.<sup>55</sup> Finally, Part V reflects on the participation of lenders in the PPP and concludes that limited lender liability has helped contribute to the PPP's general success.<sup>56</sup>

## II. THE PAYCHECK PROTECTION PROGRAM

When COVID-19 was first discovered on December 31, 2019, most of the world did not realize how their lives would be uprooted in the following year.<sup>57</sup> On January 30, 2020, the World Health Organization (“WHO”) declared that COVID-19 was a public health emergency of

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50. See, e.g., *Jacques v. First Nat'l Bank*, 307 Md. 527, 545, 515 A2d. 756, 765 (Md. Ct. App. 1986) (holding that lenders may be liable at common law and therefore owe both contract and tort damages, including punitive damages, for failure to process loan applications with due care).

51. See Stacey Cowley, *Despite Billions in Fees, Banks Predict Meager Profits on P.P.P. Loans*, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/10/01/business/ppp-loans-bank-profits.html> [<https://perma.cc/R2PD-SEK3>] (describing how banks are reporting the costs to service PPP loans is expected to wipe out the profits earned from fees paid by the SBA and interest rate).

52. See Jeanna Smialek, *Big Banks Aren't Embracing Fed's Main Street Lending Program*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/business/economy/federal-reserves-lending-coron.html> [<https://perma.cc/XFV7-X3CT>] (concluding that big banks are unlikely to participate in other government loan programs like the Main Street Lending Program because the PPP caused lenders to incur heavy costs from ongoing litigation and therefore left PPP lenders “a sour taste”).

53. See *infra* Part II.

54. See *infra* Part III.

55. See *infra* Part IV.

56. See *infra* Part V.

57. Reid, *supra* note 5.



international concern.<sup>58</sup> By March 11, 2020, the WHO declared a pandemic.<sup>59</sup>

The pandemic quickly devastated the U.S. economy.<sup>60</sup> In fact, the pandemic is continuing to have a disproportionate impact on small business owners.<sup>61</sup> To mitigate the harmful effects of this pandemic, the federal government enacted the PPP as part of the CARES Act.<sup>62</sup> Implementing this type of program required a vast government power that the federal government has developed over the course of U.S. history.<sup>63</sup>

#### A. *Government Power During Financial Crises*

The federal government has vast power over the U.S. economy during economic downturns.<sup>64</sup> Throughout U.S. history, the federal government has exercised its power to intervene in financial crises.<sup>65</sup> There are three historical periods that are most significant in defining the scope of government power to implement the PPP: The Panic of 1907, the Great Depression of the 1930s, and the Great Recession of 2008.<sup>66</sup>

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58. *Id.*

59. *Id.*

60. Fairle, *supra* note 7.

61. *See id.* (explaining how COVID-19's impact on American small business owners is "likely to be severe").

62. Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") § 1102, 15 U.S.C.A. § 636(a)(36) (West 2021).

63. *See generally* Robert Higgs, *The Growth of Government in the United States*, FOUND. FOR ECON. EDUC. (Aug. 1, 1990), <https://fee.org/articles/the-growth-of-government-in-the-united-states/> [<https://perma.cc/MLA2-YMQ3>] (describing the increase of U.S. government intervention in the economy over U.S. history).

64. *See generally id.* (describing the increase of U.S. government intervention in the economy over U.S. history).

65. *See* Steve Lohr, *Intervention Is Bold, But Has a Basis in History*, N.Y. TIMES (Oct. 13, 2008), <https://www.nytimes.com/2008/10/14/business/economy/14nationalize.html> [<https://perma.cc/RF9W-JRFA>] (explaining that the U.S. federal government's power to intervene during the 2008 Financial Crisis was rooted in authority that the federal government exercised throughout US history).

66. *See* US DEP'T OF STATE, THE ROLE OF GOV'T IN THE ECON. <https://usa.usembassy.de/etexts/oecon/chap6.htm> [<https://perma.cc/3TF3-6ESH>] (last visited October 6, 2020) (highlighting that the most significant government interventions in the economy were the creation of the Federal Reserve Bank, New Deal, and federal deposit insurance fund, which were intended to address future financial crises and the unique aspects of banking in the economy); *see also* Robert K. Rasmussen, *Governmental Intervention in an Economic Crisis*, 19 U. OF PA. J. OF BUS. LAW, 7, 13–22 (2016) <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1529&context=jbl> [<https://perma.cc/6KX7-P6TD>] (analyzing federal government intervention during the Great

Congress passed the Federal Reserve Act (“FRA”)<sup>67</sup> after the Panic of 1907 to create a federal oversight system that continues to this day.<sup>68</sup> The FRA implemented this system of federal oversight through an agency called the Federal Reserve Board of Governors (“FRB”).<sup>69</sup> The FRA delegated power to the FRB to run regional federal reserve banks, and those banks serve as the lender of last resort in the economy.<sup>70</sup> Ultimately the federal reserve banks act as lenders for banks through the discount window.<sup>71</sup>

During the Great Depression of the 1930s, government intervention greatly expanded the scope of government power, creating programs that remain in effect today.<sup>72</sup> One such program is the Federal Deposit Insurance Corporation (“FDIC”).<sup>73</sup> The FDIC protects a customer’s bank deposit up to \$250,000 in the event of a bank failure.<sup>74</sup> By expanding the federal power to protect a customer’s deposits from risky bank activities, a strong federal safety net was created in the financial system.<sup>75</sup>

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Recession of 2008 and the legal impact this crisis has on government intervention in future financial crises).

67. *Cf.* Federal Reserve Act § 1, 12 U.S.C. § 226 (2018) (codifying the Federal Reserve Act).

68. FED. RESERVE BANK OF MINNEAPOLIS, *BORN OF A PANIC: FORMING THE FED SYSTEM* (1988), <https://www.minneapolisfed.org/article/1988/born-of-a-panic-forming-the-fed-system> [<https://perma.cc/UN7E-QMQE>].

69. *See* Federal Reserve Act § 10, 12 U.S.C. § 241 (2018) (describing the creation and structure of the Board of Governors of the Federal Reserve System).

70. FED. RESERVE BANK OF MINNEAPOLIS, *supra* note 68.

71. *See* Federal Reserve Act § 13, 12 U.S.C. § 347a (2018) (explaining the conditions that member banks must comply with to receive loans through the discount window of the Federal Reserve Banks).

72. *See generally* Hugh Rockoff, *By Way of Analogy: The Expansion of the Federal Government in the 1930s*, U. OF CHI. PRESS, 125, 125 (1998) (describing how the New Deal during the Great Depression greatly expanded the federal government’s authority).

73. *See generally* HIST. OF THE FDIC, <https://www.fdic.gov/about/history/> [<https://perma.cc/UXX5-H5JX>] (offering transcripts and recordings from the 1930s when the FDIC was created).

74. *See* 12 U.S.C. § 1821(a)(1)(E) (2018) (changing the “standard maximum deposit insurance amount” from \$100,000 to \$250,000, making permanent a change the FDIC exercised using its emergency powers during the 2008 Financial Crisis).

75. *See* ABOUT FDIC: WHAT WE DO, <https://www.fdic.gov/about/what-we-do/index.html> (May 15, 2020) [<https://perma.cc/6YJQ-9JTB>] (“The mission of the Federal Deposit Insurance Corporation (FDIC) is to maintain stability and public confidence in the nation’s financial system. In support of this goal, the FDIC: [i]nsures deposits, [e]xamines and supervises financial institutions for safety and soundness and consumer protection, [w]orks to make large and complex financial institutions resolvable, and [m]anages receiverships.”).

The FRB and FDIC exercised broad emergency powers that were later limited through Congressional action.<sup>76</sup> During the Great Recession of 2008, the FRB helped individual financial institutions. The FDIC exercised its authority under the systemic risk exception to implement broad-based eligibility programs to protect uninsured depositors and other bank creditors.<sup>77</sup> Both the FRB and FDIC's actions were widely criticized.<sup>78</sup> When the FRB chose to bail out Bear Sterns and American International Group ("AIG"), but not Lehman Brothers, the FRB was criticized because it seemed to choose the winners and losers in the economy.<sup>79</sup> The FDIC's exercise of the systemic risk exception was widely criticized as inconsistent with the FDIC's statutory authority, which critics read to authorize the FDIC to help only individual financial institutions.<sup>80</sup> In response to this public criticism, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")<sup>81</sup> was passed. Dodd-Frank eliminated the FRB's power to assist individual financial institutions.<sup>82</sup> It also confirmed the FDIC's power to use the systemic risk exception and implement the broad-based eligibility

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76. U.S. GOV'T ACCOUNTABILITY OFF., TROUBLED ASSET RELIEF PROGRAM (2010), <https://www.gao.gov/new.items/d1025.pdf> [<https://perma.cc/LD76-TBQM>] [hereinafter TROUBLED ASSET RELIEF PROGRAM].

77. U.S. GOV'T ACCOUNTABILITY OFF., GOV'T SUPPORT FOR BANK HOLDING COMPANIES (2013), <https://www.gao.gov/assets/660/659004.pdf> [hereinafter GOV'T SUPPORT FOR BANK HOLDING COMPANIES].

78. See, e.g., *Letting Lehman Go Was a Big Mistake: French Finmin*, REUTERS (Oct. 8, 2008, 3:35 AM) <https://www.reuters.com/article/us-france-economy/letting-lehman-go-was-big-mistake-french-finmin-idUSTRE49735Z20081008> [<https://perma.cc/68QZ-YTT8>] (describing French Economy Minister Christine Lagarde's criticism of the failure of the US to rescue Lehman Brothers as "horrendous"); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-100, REGULATORS' USE OF SYSTEMIC RISK EXCEPTION RAISES MORAL HAZARD CONCERNS AND OPPORTUNITIES EXIST TO CLARIFY THE PROVISION (2010), <https://www.gao.gov/assets/310/303248.pdf> [<https://perma.cc/CK2C-P7YP>] (concluding that although the public has criticized FDIC's interpretation of its statutory authority under the systemic risk exception, the FDIC had sufficient basis to rely upon the systemic risk exception to implement broad-based eligibility programs, but recommended that Congress should clarify FDIC's authority under that exception).

79. GOV'T SUPPORT FOR BANK HOLDING COMPANIES, *supra* note 77; TROUBLED ASSET RELIEF PROGRAM, *supra* note 76.

80. GOV'T SUPPORT FOR BANK HOLDING COMPANIES, *supra* note 77; TROUBLED ASSET RELIEF PROGRAM, *supra* note 76.

81. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1, 12 U.S.C. § 53 (2018).

82. Dodd-Frank § 1101(a)(6), 12 U.S.C. § 343(B)(i).

programs.<sup>83</sup> As a result, the ambiguities in the previous statute were removed.<sup>84</sup> However, this authority did not come without limitations—the systemic risk exception can only be exercised for broad-based programs when both the FRB and FDIC, the Secretary of Treasury in consultation with the President, and Congress approve the program.<sup>85</sup>

These three historical events—the Panic of 1907, Great Depression of the 1930s, and Great Recession of 2008—helped shaped the scope of government power to intervene during the COVID-19 pandemic.<sup>86</sup> Most importantly, the changes under Dodd-Frank require the PPP to only involve banks that volunteer to become PPP lenders and meet the general requirements to participate.<sup>87</sup>

### *B. Government Power to Implement the PPP*

Congress created the CARES Act to administer PPP loans as quickly as possible on a “first-come, first-served”<sup>88</sup> basis to help small businesses keep their employees on payroll and remain financially viable.<sup>89</sup> Like the FRA and EESA, the CARES Act delegated authority to an executive agency to create an emergency loan program.<sup>90</sup> Specifically, the CARES Act delegated authority to the SBA to implement the PPP.<sup>91</sup> The SBA was delegated authority to provide \$659

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83. See Dodd-Frank § 203, 12 U.S.C. § 1823(c)(4)(G) (explaining that the FDIC “may take other action” outside of the least cost method to liquidate a failing financial institution).

84. TROUBLED ASSET RELIEF PROGRAM, *supra* note 76.

85. GOV’T SUPPORT FOR BANK HOLDING COMPANIES, *supra* note 77; TROUBLED ASSET RELIEF PROGRAM, *supra* note 76.

86. See Rasmussen, *supra* note 66 (discussing the role of government intervention in the 2008 Great Recession); see also FED. RESERVE BANK OF MINNEAPOLIS, *supra* note 68 (explaining the role the Panic of 1907 played in creating the Federal Reserve Bank); see also Werner, *supra* note 19 (describing the government intervention during the COVID-19 pandemic as one of the largest in US history).

87. See Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) § 1102, 15 U.S.C.A. § 636(a)(36)(F)(ii) (West 2021) (providing the generally applicable requirements that banks participating in PPP must implement).

88. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20813 (Apr. 15, 2020), [https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule\\_0.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf) [<https://perma.cc/X458-EPXB>] (promulgating interim final rule explaining that lenders must process PPP loans on a first-come, first-serve basis).

89. Press Release from Maxine Waters, *supra* note 30.

90. CARES Act § 1102, 15 U.S.C.A. § 636(a)(36).

91. *Id.*

billion for the first two rounds of the PPP.<sup>92</sup> Congress then supplemented the CARES Act with a third round of funding on December, 27, 2020, through the Relief Act.<sup>93</sup>

There are several requirements in the CARES Act that applicants must follow to be eligible for PPP loans.<sup>94</sup> The CARES Act requires applicants to answer two questions: (1) whether the borrower was in business on February 15, 2020 and (2) whether the borrower had employees for whom the borrower paid salaries and payroll taxes, or paid independent contractors.<sup>95</sup> Borrowers should also make a good faith certification of their eligibility.<sup>96</sup> Moreover, there are size limitations for borrowers to be eligible for PPP loans.<sup>97</sup> Borrowers must fall within the definition of a “small business concern,” meaning a business of 500 or fewer employees.<sup>98</sup>

However, the CARES Act offered two exceptions to the small business concern rule.<sup>99</sup> First, the CARES Act allowed businesses with more than 500 employees to qualify for PPP loans if they had been uniquely affected by the pandemic or counted as a “business concern” under the Small Business Act.<sup>100</sup> For example, restaurants and hotel chains could have participated regardless of their size because they had been uniquely affected by the pandemic due to being among the first to

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92. *The CARES Act Provides Assistance to Small Businesses*, *supra* note 20.

93. Consolidated Appropriations Act of 2021 (“Relief Act”), Pub. L. No. 116–260, 134 Stat. 1182, 1993.

94. *See* § 636(a)(36)(G) (providing the requirements for borrower eligibility for PPP loans).

95. CARES Act § 1102(a)(1)(B), 15 U.S.C.A. § 636(a)(36)(F)(ii)(II)(aa).

96. *See* CARES Act § 1102(a)(1)(B), 15 U.S.C.A. § 636(a)(36)(G)(i)(I) (explaining that the borrowers must make a good faith certification that their current economic uncertainty makes their loan request necessary to support their ongoing operations, the funds will be used to retain workers and maintain payroll or make mortgage interest payments, and utility payments, and the applicant has not received another PPP loan).

97. *See* CARES Act § 1102(a)(1)(B), 15 U.S.C.A. § 636(a)(36)(D)(i) (explaining the size limitation for businesses applying for PPP loans).

98. CARES Act § 1102(a)(1)(B), 15 U.S.C.A. § 636(a)(36)(D)(i)(I).

99. *Id.*

100. CARES Act § 1102(a)(1)(B), 15 U.S.C.A. § 636(a)(36)(D)(i)(II) (“If applicable, the size standard in number of employees established by the Administration for the industry in which the business concern . . . operates.”).

shut down.<sup>101</sup> Second, PPP loans were also made available to nonprofit organizations.<sup>102</sup>

The rules governing loan forgiveness depend on whether the borrower's loan forgiveness was granted before or after the Relief Act. If granted before the enactment of this Act, then borrowers could have only borrowed up to the lesser of 2.5 times their monthly payroll costs or \$10 million, and borrowers must have used this money toward payroll and other business related expenses.<sup>103</sup> Most importantly, 60% of the loan needs to be used toward payroll costs if the borrowers want to be eligible for loan forgiveness,<sup>104</sup> and if the loan is not forgiven, then the CARES Act allows the SBA to defer PPP loan payments for up to one year.<sup>105</sup> Additionally, PPP loans are forgiven when used for payroll costs and nonpayroll costs, such as business mortgage interest payments, rent or lease payments, or utility payments.<sup>106</sup>

If the borrower's loan forgiveness was granted after the Relief Act, then loan forgiveness is applicable to additional categories of business expenditures.<sup>107</sup> The new categories that are covered are operations expenditures, property damage and vandalism costs from public disturbances during 2020, supplier costs that are part of contractual obligations and are essential for business operations, worker protection expenditures related to COVID-19 regulations, and employee insurance

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101. Bob Davis, *Big Restaurant, Hotel Chains Won Exemption to Get Small Business Loans*, WALL ST. J. (Apr. 6, 2020), <https://www.wsj.com/articles/big-restaurant-hotel-chains-won-exemption-to-get-small-business-loans-11586167200> [<https://perma.cc/5ZUW-BL8Y>] (“While the new \$350 billion Paycheck Protection Program is aimed at businesses with 500 or fewer employees, language in the \$2 trillion federal stimulus bill allows big restaurant and hotel chains to participate regardless of how many people they employ.”).

102. CARES Act § 1102(a)(1)(B), 15 U.S.C.A. § 636(a)(36)(a)(B)(D)(i).

103. *See* CARES Act § 1102(a)(1)(B), 15 U.S.C.A. § 636(a)(36)(E)(F) (explaining that PPP loans can only be used for payroll costs, costs related to the continuation of healthcare benefits and insurance premiums, employee salaries and commissions, interest on mortgage obligations, interest on debt incurred before February 15, 2020, and refinancing an SBA Economic Injury Disaster Loan (“EIDL”) loan made between January 31, 2020 and April 3, 2020).

104. CARES Act § 1106, 15 U.S.C.A. § 9005(d)(8).

105. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20813 (Apr. 15, 2020), [https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule\\_0.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf). [<https://perma.cc/X458-EPXB>].

106. *Id.*

107. *See* Consolidated Appropriations Act of 2021 (“Relief Act”), Pub. L. No. 116–260, 134 Stat. 1182, 2005 (adding categories of expenditures that the SBA might forgive for any forgiveness granted after the passage of this new statute).

if listed as payroll costs.<sup>108</sup> PPP loans of \$150,000 and less have a more streamlined application of merely one page.<sup>109</sup> Finally, most PPP loans will be forgiven.<sup>110</sup>

Moreover, the maturity of the loan depends on when the bank provided it.<sup>111</sup> PPP loans have a maturity of two years if the loan originated before June 10, 2020, and five years if the loan originated after June 10, 2020.<sup>112</sup> To the benefit of borrowers, no interest payments were needed until six months after the initial disbursement; however, interest still accrued during this time.<sup>113</sup> Congress has authorized three rounds of PPP funding to date. Congress authorized \$349 billion during the first round<sup>114</sup> and an additional \$310 billion for the second round.<sup>115</sup> The second round of PPP funding was needed because the funding from the first round dried up faster than expected.<sup>116</sup> Congress then supplemented the CARES Act with a third round of funding on December 27, 2020 through the Relief Act.<sup>117</sup>

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108. *Id.*

109. Relief Act, Pub. L. No. 116–260, 134 Stat. 1182, 1998–2000.

110. See Stacey Cowley, *Small Business Loans Will be Forgiven, But Don't Ask How*, N.Y. TIMES (Dec. 2, 2020), <https://www.nytimes.com/2020/10/09/business/small-business-ppp-loans-forgiveness.html> [<https://perma.cc/BRF7-K6DQ>] (explaining that most PPP small business loans, especially the smallest ones, are likely to be forgiven).

111. Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36310 (June 16, 2020) (to be codified at 13 C.F.R. pt. 120), <https://www.govinfo.gov/content/pkg/FR-2020-06-16/pdf/2020-12909.pdf> [<https://perma.cc/9LBV-W3AE>] (“If a borrower’s PPP loan is disbursed on June 25, 2020, the 24-week period ends on December 10, 2020. If the borrower does not submit a loan forgiveness application to its lender by October 10, 2021, the borrower must begin making payments on or after October 10, 2021.”).

112. *Id.*

113. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20813 (Apr. 15, 2020), [https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule\\_0.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf). [<https://perma.cc/X458-EPXB>].

114. Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) § 1102(b)(1), 15 U.S.C.A. § 636(a)(36) (West 2021).

115. See Paycheck Protection Program and Healthcare Enhancement Act of 2020 § 101(a)(1), 15 U.S.C.A. § 636(a)(36) (West 2021) (providing an addition \$310 billion in funding toward the Paycheck Protection Program).

116. See Mark Niquette & Jennifer Jacobs, *Small Business Relief Funds Drained Fast With Many Shut Out*, BLOOMBERG NEWS (Apr. 16, 2020, 10:33 AM), <https://www.bloomberg.com/news/articles/2020-04-16/virus-rescue-program-for-small-business-runs-out-of-money> [<https://perma.cc/DC94-9RU8>] (explaining why Congress planned on passing a second round of PPP funding because the first round drained fast).

117. Consolidated Appropriations Act of 2021 (“Relief Act”), Pub. L. No. 116–260, 134 Stat. 1182, 2001–07.



The Act created two loan types: (1) original PPP loans for businesses that did not apply the first time, previously returned the loan, or were denied the loan, and (2) PPP loans known as Second Draw Loans for hard-hit businesses that previously received a PPP loan.<sup>118</sup> For the two loan types, the original PPP loan requirements outlined above and the new requirements apply.<sup>119</sup>

One new requirement to qualify for Second Draw Loans is that the applicant must have used the full amount of the original PPP loan by the time the Second Draw Loan is disbursed.<sup>120</sup> Another new requirement is that the definition of “small business concern” has changed to mean a business with 300 or fewer employees that can show a loss of at least a 25% reduction in revenue loss for any quarter in 2020.<sup>121</sup> However, that size limitation is not applicable to restaurants and other entities that satisfy the SBA’s alternative size requirements.<sup>122</sup> Finally, the SBA will forgive Second Draw Loans based on the rules that govern loan forgiveness after the passage of the Relief Act.<sup>123</sup>

While the CARES Act purports to give banks incentives to participate in the PPP, it has come with unintended consequences. Indeed, the CARES Act offers banks an incentive by paying fees for originating loans (“origination fees”),<sup>124</sup> but the Act brings three notable

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118. See Relief Act, 134 Stat. at 1993–2007 (providing sections 301 through 311 which are the provisions on changes to original PPP loans and the creation of Second Draw Loans).

119. Michael Flynn, *Buchalter COVID-19 Client Alert: New PPP Changes in the Stimulus Bill: Second PPP Loan for Hardest-Hit Existing PPP Borrowers, Additional Categories of Forgivable Expenses, Tax Deductibility for Expenses Paid with PPP Proceeds, Lender Liability Limitations, Simplified Forgiveness Application for Loans of \$150,000 or Less, and Other Changes*, BUCHALTER (Dec. 28, 2020), <https://www.buchalter.com/publication/buchalter-covid-19-client-alert-new-ppp-changes-in-the-stimulus-bill-second-ppp-loan-for-hardest-hit-existing-ppp-borrowers-additional-categories-of-forgivable-expenses-tax-deductibility-for-expe/> [https://perma.cc/WE7Y-6HAT] (“Note that, along with the provisions of the Act specifically applying to Second Draw Loans set out in this section, the provisions of the Act applicable all PPP loans set forth in the next section below (Provisions of the Act Applying to PPP Loans Generally, Including Second Draw Loans) also apply to Second Draw Loans.”).

120. Relief Act, 134 Stat. at 2019.

121. Relief Act, 134 Stat. at 2001.

122. See Relief Act, 134 Stat. at 2003–04 (providing entities uniquely affected by the pandemic, such as NAICS 72 entities, meaning restaurants).

123. See Relief Act, 134 Stat. 2001–07 (adding categories of expenditures that the SBA might forgive for any forgiveness granted after the passage of this new statute).

124. See Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) § 1106, 15 U.S.C.A. § 636(a)(36)(P)(i) (West 2021) (explaining that SBA pays PPP lenders 1% for

drawbacks. First, banks cannot request any payment from borrowers, such as servicing fees, in addition to the money borrowers pay back on the loan.<sup>125</sup> Second, banks can only earn 1% interest on these loans from borrowers.<sup>126</sup> Third, if an agent helps a borrower with its PPP application, demonstrated by a written agreement with the bank,<sup>127</sup> the “agent fees will be paid by the lender.”<sup>128</sup> Now an important issue remains—whether those three drawbacks are enough to reduce the profitability of PPP loans.<sup>129</sup>

### III. SERVICING LIABILITY FOR PPP LENDERS

The profitability of a bank is based in part on a bank’s net interest margin.<sup>130</sup> A reduction in the spread between a bank’s net interest income

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originating loans of at least 2 million, 3% for loans more than \$350,000 but less than \$2 million, and 5% for loans not more than \$350,000).

125. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20813 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120), [https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule\\_0.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf) [<https://perma.cc/X458-EPXB>].

126. *Id.*

127. *See* Juan Antonio Sanchez, PC v. Bank of South Tex., 2020 WL 6060868 at \*2 (S.D. Tex. Oct. 14, 2020) (holding that PPP lenders do not owe compensation to agents who helped PPP applicants submit their application if there is no contract to that effect); Flynn, *supra* note 119 (“A lender is only responsible for paying an agent’s fees in regard to services for which the lender directly contracted with the agent.”).

128. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20816 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120), [https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule\\_0.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf) [<https://perma.cc/X458-EPXB>] (“Agent fees will be paid by the lender out of the fees the lender receives from SBA . . . One (1) percent for loans of not more than \$350,000; 0.50 percent for loans of more than \$350,000 and less than \$2 million; and 0.25 percent for loans of at least \$2 million.”).

129. U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-701, COVID-19: FEDERAL EFFORTS COULD BE STRENGTHENED BY TIMELY AND CONCERTED ACTIONS (2020), <https://www.gao.gov/reports/GAO-20-701/#top> [<https://perma.cc/6ATB-4RK8>] (“Representatives of two associations commented that the resource demands and the lack of clarity surrounding the application and forgiveness processes have led to lender fatigue with the program. Representatives noted that this lender fatigue could result in members being less likely to participate should there be future rounds of the program.”).

130. J. B. Maverick, *What Is the Average Profit Margin for a Company in the Banking Sector?*, INVESTOPEDIA, (Aug. 26, 2020), <https://www.investopedia.com/ask/answers/052515/what-average-profit-margin-company-banking-sector.asp#:~:text=The%20net%20interest%20margin%20is,comes%20primarily%20from%20issuing%20loans.> [<https://perma.cc/DVD7-ZSN5>] (“The net interest margin is, for banks, a similar measure to gross profit margin for most companies, calculated by subtracting total interest expense from the bank’s total interest income. Interest income for banks comes

and net interest expense stems from a declining return on the bank's assets, causing the margin to shrink.<sup>131</sup> When the revenue earned from fees and annual interest paid on the loan is less than the costs of servicing the loan, holding the loan is not profitable.<sup>132</sup> The higher cost that results from servicing the loan is called servicing liability.<sup>133</sup>

Loan servicing liabilities are often the result of three things—costs to fund the loan,<sup>134</sup> costs to process loan applications,<sup>135</sup> and costs to process loan forgiveness requests.<sup>136</sup> First, banks can borrow from the FRB to fund loans to their customers.<sup>137</sup> The FRB charges banks an interest rate on the loan that is then subtracted from their net interest income.<sup>138</sup> Second, the servicing costs from processing loan applications

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primarily from issuing loans. Interest expenses represent the interest that banks must pay on the variety of deposit accounts held by the bank's customers.”).

131. See FED. DEPOSIT INS. CORP., OTHER ASSETS AND LIABILITIES, <https://www.fdic.gov/regulations/safety/manual/section3-7.pdf> (last visited Sept. 13, 2020) [<https://perma.cc/EU83-PGJ7>] (explaining that the “other asset or other liability categories” shown on a bank's balance sheet include servicing liabilities, meaning a loss of money from servicing a bank's assets, which reduces a bank's net interest income).

132. Julia Kagan, *Loan Servicing Definition*, INVESTOPEDIA (Feb. 20, 2020), [https://www.investopedia.com/terms/l/loan\\_servicing.asp](https://www.investopedia.com/terms/l/loan_servicing.asp) [<https://perma.cc/APU4-J5MP>] (listing examples of loan servicing as sending monthly payment statements and collecting the monthly payments, maintaining records of payments and balances, and collecting and paying taxes and insurance).

133. OTHER ASSETS AND LIABILITIES, *supra* note 131.

134. See Julia Kagan, *Cost of Funds*, INVESTOPEDIA (Dec. 18, 2020), <https://www.investopedia.com/terms/c/costoffunds.asp> [<https://perma.cc/Q7H2-CK3W>] (analyzing the costs that lenders face to fund loans).

135. See Julia Kagan, *Loan Application Fee*, INVESTOPEDIA (Dec. 30, 2020), <https://www.investopedia.com/terms/l/loan-application-fee.asp#:~:text=Types%20of%20Loan%20Fees,-Loan%20application%20fees&text=In%20general%2C%20fees%20help%20a,appraisal%20fees%2C%20and%20administration%20fees.> [<https://perma.cc/MA6H-QXHW>] (explaining that lenders charge loan application fees because there are costs associated with processing loan applications).

136. See Kevin Wack, *Big Banks Call for Blanket Forgiveness of PPP Loans Under \$150,000*, AM. BANKER, Mar. 15, 2020, 9:37 PM, <https://www.americanbanker.com/news/big-banks-call-for-blanket-forgiveness-of-ppp-loans-under-150-000#:~:text=In%20a%20letter%20Thursday%20to,to%20the%20banking%20trade%20groups> [<https://perma.cc/JU8W-PZZE>] (showing how PPP lenders have expressed concerns about the costs associated with loan forgiveness, motivating them to get rid of PPP loans from their balance sheets).

137. See Federal Reserve Act § 13, 12 U.S.C. § 347a (2018) (explaining the conditions that member banks must comply with to receive loans through the discount window of the Federal Reserve Banks).

138. See Ben Sabloff, *Is It Easier to Ask for Forgiveness Than Permission? Not for PPP Loans Under \$150K*, AQN STRATEGIES, <https://www.aqnstrategies.com/aqncentral/forgive->

come in large part from underwriting the loans.<sup>139</sup> Underwriting can involve high costs to ensure that borrowers do not pose credit or interest rate risk to banks and make sure that banks comply with their statutory obligations.<sup>140</sup> Third, banks pay servicing costs to process borrowers' applications for loan forgiveness.<sup>141</sup>

Banks similarly incurred servicing costs for providing PPP loans.<sup>142</sup> Some PPP lenders borrowed money from the FRB's Paycheck Protection Program Liquidity Facility ("PPPLF")<sup>143</sup> to fund the loans they offered to borrowers.<sup>144</sup> Borrowing from the PPPLF caused banks to pay a servicing cost of thirty-five basis points annually on the loan.<sup>145</sup> This cost is subtracted from the net interest income of the PPP lenders, so thirty-five basis points are subtracted from the 1% interest rate banks earn on PPP loans.<sup>146</sup> Therefore, banks only earn 0.65% interest on their PPP loans.<sup>147</sup>

PPP lenders also incur servicing costs when processing loan applications. When processing loan applications, banks must incur labor costs to review applications and conduct underwriting.<sup>148</sup> Origination

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small-ppp [<https://perma.cc/74X8-L62W>] (last visited Sept. 13, 2020) (detailing how PPP lenders stand to earn less than the interest rate required by the CARES Act because many lenders themselves are paying interest on loans borrowed from the FRB).

139. Kagan, *supra* note 135.

140. Caroline Banton, *Underwriting*, INVESTOPEDIA (Sept. 10, 2020), <https://www.investopedia.com/terms/u/underwriting.asp> [<https://perma.cc/4FFE-P4GA>].

141. C.f. Wack, *supra* note 136 (explaining that PPP lenders are worried about the costs of processing loan forgiveness applications).

142. John Reosti, *As PPP Enters Forgiveness Phase, Some Banks See Outsourcing As Best Move*, AM. BANKER (June 30, 2020, 4:04 PM), <https://www.americanbanker.com/news/as-ppp-enters-forgiveness-phase-some-banks-see-outsourcing-as-best-move> [<https://perma.cc/8GHF-VC9B>] (describing how some PPP lenders are trying to sell their PPP loans on the secondary market because of the servicing costs associated with the complex loan forgiveness process).

143. The PPPLF is authorized by the Federal Reserve Act. *See* Federal Reserve Act § 13(3), 12 U.S.C. § 343(B)(i) (authorizing the FRB to policies and procedures to ensure liquidity in an emergency lending program).

144. FED. RESERVE BD., PAYCHECK PROTECTION PROGRAM LIQUIDITY FACILITY (2020), <https://www.federalreserve.gov/monetarpolicy/ppplf.htm> [<https://perma.cc/9RY6-DVXS>].

145. FED. RESERVE BD., PAYCHECK PROTECTION PROGRAM LIQUIDITY FACILITY TERM SHEET (2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200430b1.pdf> [<https://perma.cc/5QCN-YB7X>].

146. Sabloff, *supra* note 138.

147. *Id.*

148. *Id.*

fees only compensate banks for underwriting costs.<sup>149</sup> Servicing the PPP loans throughout the life of the loan also involves labor and third party costs.<sup>150</sup> For example, banks had to require their employees to work long hours and on weekends to process PPP loans and service them.<sup>151</sup> Moreover, banks had to spend money on consultants to help them process the high volume of PPP loan applications.<sup>152</sup>

Additionally, PPP lenders face servicing costs for processing loan forgiveness applications.<sup>153</sup> These servicing costs are particularly important given that most PPP loans will likely be forgiven.<sup>154</sup> Like the servicing costs for processing PPP loan applications, lenders must incur labor costs to review the PPP forgiveness applications.<sup>155</sup> In fact, many banks needed to outsource labor to process loan forgiveness applications because outside companies could do so more cheaply and effectively.<sup>156</sup>

However, since the passage of the Relief Act, servicing costs for smaller PPP loans have reduced. The forgiveness process for smaller

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149. *Id.*; see also Ryan Abdoo & Joe Vloedman, *PPP Loans: What Financial Institutions Need to Know Related to Accounting*, PLANTE MORAN (July 30, 2020), <https://www.plantemoran.com/explore-our-thinking/insight/2020/07/ppp-loans-what-financial-institutions-need-to-know-related-to-accounting> [<https://perma.cc/V2P8-PVR4>].

150. See Reosti, *supra* note 142 (explaining that many banks are incentivized to sell their PPP loan portfolios because of the high servicing costs that come from devoting employees and third party resources to processing PPP loans).

151. See Brian Schaffer, *PPP Loan Processors May Be Owed Significant Wages*, FITAPELLI & SCHAFER BLOG, <https://www.fslawfirm.com/blog/2020/05/ppp-loan-processors-may-be-owed-significant-wages/> [<https://perma.cc/68R3-HPWN>] (last visited Feb. 5, 2021) (describing the long work hours for many bank employees, including those who do not normally perform loan processing functions, because of the high demand for PPP loans).

152. Reosti, *supra* note 142.

153. Wack, *supra* note 136.

154. See SMALL BUS. ADMIN., 1.1 MILLION PAYCHECK PROTECTION PROGRAM LOANS FORGIVEN SO FAR TOTALING OVER \$100 BILLION (Jan. 12, 2021), <https://www.sba.gov/article/2021/jan/12/11-million-paycheck-protection-program-loans-forgiven-so-far-totaling-over-100-billion#:~:text=1.1%20Million%20Paycheck%20Protection%20Program%20Loans%20Forgiven%20So%20Far%20Totaling%20Over%20%24100%20Billion> [<https://perma.cc/PLT5-7EE9>] (detailing the fast pace of loan forgiveness).

155. See Reosti, *supra* note 142 (reporting that some PPP lenders like Atlantic Union have spent money on outside companies to process loan forgiveness applications because they do not have enough personnel to meet the labor intensive costs).

156. See *id.* (explaining that some banks have outsourced the processing of loan forgiveness applications because outside companies can focus exclusively on processing loan forgiveness applications, making the process more efficient, and outsourcing is also more cheap because the outside companies offer discounts).

loans has become more clear and streamlined.<sup>157</sup> Banks expend fewer labor costs on PPP loans of less than \$150,000 because banks only need to review a 1-page forgiveness application.<sup>158</sup> Moreover, the statute requires the SBA to reimburse lenders for a portion of the servicing costs for disbursing smaller PPP loans.<sup>159</sup> PPP loans of \$50,000 or less have a higher percentage of their servicing costs reimbursed.<sup>160</sup> The lesser of 50% or \$2,500 at the time of disbursement of the loan is reimbursed.<sup>161</sup> By contrast, loans of not more than \$350,000 and greater than \$350,00 are reimbursed at 3% and 5% of the total loan size, respectively, at the time of disbursement.<sup>162</sup> For these reasons, the servicing costs for smaller PPP loans have been reduced. In other words, banks have higher servicing costs for larger PPP loans.

Presumably due to the higher labor costs and lower reimbursement for servicing larger PPP loans, larger banks are anticipating less profits from their participation in the PPP.<sup>163</sup> Because larger banks were more likely to originate loans above \$150,000,<sup>164</sup> they must navigate a more complex loan forgiveness process, bringing additional labor costs to process those loan forgiveness applications. Moreover, larger banks are more likely to provide loans of more than \$50,000,<sup>165</sup> and these are the loans that the SBA reimburses a smaller proportion of.<sup>166</sup> Smaller banks, however, will have much lower labor and third-party consultancy costs associated with processing loan forgiveness applications because they tend to give out much smaller

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157. Consolidated Appropriations Act of 2021 (“Relief Act”), Pub. L. No. 116–260, 134 Stat. 1182, 1998–2000.

158. *See id.* (providing a simplified loan forgiveness process, presumably lowering servicing costs).

159. Relief Act, 134 Stat. at 2006.

160. *See id.* (comparing the reimbursement of servicing costs for PPP loans of \$50,000 or less to PPP loans of up to \$350,000 and greater than \$350,000).

161. *Id.*

162. *Id.*

163. *See* Cowley, *supra* note 51 (reporting that larger PPP lenders are anticipating less profits from their participation in the program).

164. *See* 2020 Paycheck Protection Program Rep. at 7, [https://home.treasury.gov/system/files/136/SBA-Paycheck-Protection-Program-Loan-Report-Round2.pdf?utm\\_medium=email&utm\\_source=govdelivery](https://home.treasury.gov/system/files/136/SBA-Paycheck-Protection-Program-Loan-Report-Round2.pdf?utm_medium=email&utm_source=govdelivery) [<https://perma.cc/TJ5R-RTE6>] (showing that the top fifteen PPP lenders, which include the largest banks in the country, originated average loan sizes of close to \$150,000).

165. *Id.*

166. Relief Act, 134 Stat. at 2006.

loans.<sup>167</sup> Accordingly, the Relief Act will most likely cause higher servicing liabilities for larger banks.

Although the three primary costs of servicing liability—costs to fund the loan, costs to process loan applications, and costs to process loan forgiveness requests—pose an operational risk to PPP lenders, lenders at least have some certainty of how to mitigate this liability.<sup>168</sup> For instance, banks can remove PPP loans from their balance sheet to end their servicing liability.<sup>169</sup> Removing PPP loans free up the bank's balance sheet for more profitable loans and allow banks to recognize their fee revenue sooner.<sup>170</sup>

A bank can remove PPP loans from the balance sheet in four ways. First, the SBA can forgive the PPP loan by paying the bank the loan's principal and interest if the borrower meets certain conditions.<sup>171</sup> Because the SBA is expected to forgive most PPP loans,<sup>172</sup> most banks will be able to remove PPP loans from their balance sheet. However, the process to do so will be more costly for larger banks because they hold comparatively larger sized PPP loans.<sup>173</sup> Second, a bank can sell PPP loans to nonbank lenders in the secondary market.<sup>174</sup> Third, the borrower can default on the PPP loan, causing the SBA to pay the bank the remainder of the loan principal and interest.<sup>175</sup> Fourth, the borrower can pay the principal and interest for the PPP loan, bringing the servicing costs to an end at a maximum of five years.<sup>176</sup>

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167. Danielle Kurtzleben, *Not-So-Small Businesses Continue To Benefit From PPP Loans*, NPR (May 4, 2020, 5:51 PM), <https://www.npr.org/2020/05/04/850177240/not-so-small-businesses-continue-to-benefit-from-ppp-loans> [<https://perma.cc/87AH-D3GM>].

168. See Wack, *supra* note 136 (explaining the reasons banks want to sell off their PPP loans to free up assets on their balance sheet).

169. *Id.*

170. *Id.*

171. See Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") § 1102, 15 U.S.C.A. § 9005(d)(8) (West 2021) (providing the loan forgiveness requirements).

172. SMALL BUS. ADMIN., *supra* note 154.

173. 2020 Paycheck Protection Program Rep., *supra* note 164.

174. Wack, *supra* note 136.

175. See CARES Act § 1106, 15 U.S.C.A. § 636(a)(36)(B) (2020) (describing what SBA does in the event a PPP borrower defaults).

176. Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 3610 (June 16, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-06-16/pdf/2020-12909.pdf> [<https://perma.cc/9LBV-W3AE>].



However, banks have little certainty of how to resolve another type of liability—lawsuits under common law.<sup>177</sup> Banks face lender liability in addition to servicing liability because they serviced PPP loan applications in a manner that is perceived to be unfair by denied applicants and agents of borrowers.<sup>178</sup>

#### IV. LENDER LIABILITY FOR PPP LENDERS

Banks serviced PPP loans contrary to the expectations of applicants and agents, causing these disgruntled groups to bring claims under common law theories<sup>179</sup> similar to those previously brought against banks in the past.<sup>180</sup> PPP borrowers must rely on common law theories of liability because the CARES Act does not grant a private right of action to private plaintiffs.<sup>181</sup> There are three theories of liability that are firmly established in case law on lender liability, and these theories frequently ground the claims brought against PPP lenders—intentional interference with prospective economic advantage, negligence, and unjust enrichment.<sup>182</sup> For claims brought under the theory of negligence, for example, lender liability typically stems from a lender's conduct that falls below the standards of reasonable care, causing injury to a borrower.<sup>183</sup> In *First Federal Savings & Loan Ass'n v. Caudle*,<sup>184</sup> a lender was found

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177. See Travisano, *supra* note 47 (listing many criticisms which members of the public have of PPP lenders).

178. *Id.*

179. See, e.g., *Profiles, Inc. v. Bank of America Corp.*, 453 F. Supp. 3d 742 (D. Md. Apr. 13, 2020) (adjudicating PPP loan applicant's claim that Bank of America was liable on the common law theory of negligence for not processing PPP loan applications on a first-come, first-serve basis, contrary to the expectations of small businesses).

180. See, e.g., *First Federal Savings & Loan Ass'n v. Caudle*, 425 So. 2d 1050, 1052–1053 (Ala. 1982) (holding that a lender was liable for negligence at common law for failing to process the borrower's loan application with reasonable care).

181. See, e.g., *Profiles*, at 751–752 (dismissing claim that PPP lenders violated the CARES Act because Congress did not intend a private right of action).

182. See, e.g., *Complaint for Plaintiff at 24–27, 29–31, Sha-Poppin Gourmet Popcorn LLC v. JPMorgan Chase Bank, N.A.*, No. 1:20-cv-02523 (N. Ill. Apr. 24, 2020) (alleging that Chase is liable for interfering with the plaintiff's economic advantage, being negligent, and being unjustly enriched); see also *Complaint for Plaintiff, Karen's Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, complaint filed, 2020 WL 2754919 (S.D. Cal. May 22, 2020) (suing Wells Fargo on the common law theory of negligence).

183. See, e.g., *Caudle*, at 1051 (holding on a borrower's claim of negligence that a lender failed to process the borrower's loan application with reasonable care, causing injury to the borrower by being forced to receive a more expensive loan at another bank).

184. 425 So. 2d 1050 (Ala. 1982).

liable for failing to process a loan application with reasonable care.<sup>185</sup> The lender had purported to accept the borrower's application for a government sponsored loan when it instead had denied that loan.<sup>186</sup> That denial caused injury to the borrower by requiring the borrower to obtain a less advantageous, higher interest loan at another bank.<sup>187</sup>

Likewise, negligence claims brought by denied applicants contend that PPP lenders should be found liable for failing to process PPP loan applications with reasonable care.<sup>188</sup> The denied applicants argue that the conduct of the lenders fell below the standard of "reasonable care" because the lenders had instead prioritized the processing of applications for preexisting customers.<sup>189</sup> In the eyes of the denied applicants, banks should have processed PPP loan applications on a "first come, first served" basis.<sup>190</sup> Prioritizing preexisting customers arguably caused injury by requiring denied applicants to obtain less advantageous, lower valued PPP loans at other banks.<sup>191</sup> Because many denied applicants have felt the same way, class action lawsuits have been brought against PPP lenders.<sup>192</sup>

Moreover, banks may face liability at common law for claims brought by the agents who helped borrowers with their application.<sup>193</sup> Those agents have brought claims compelling PPP lenders to compensate them because the agents helped lenders provide PPP loans by assisting

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185. *Id.* at 1050.

186. *Id.*

187. *Id.*

188. Complaint for Plaintiff at 24–25, *Sha-Poppin Gourmet Popcorn LLC v. JPMorgan Chase Bank, N.A.*, No. 1:20-cv-02523 (N. Ill. Apr. 24, 2020).

189. *Id.*

190. Complaint for Plaintiff at 24–25, *Sha-Poppin Gourmet Popcorn LLC v. JPMorgan Chase Bank, N.A.*, No. 1:20-cv-02523 (N. Ill. Apr. 24, 2020) (claiming that Chase was dishonest for knowing that it would favor "commercial clients" for PPP loan applications while advertising to the public that they were "an SBA-affiliated lender willing and able to process PPP loan applications").

191. *See, e.g., id.* at 25 (pleading facts that the denied applicants had to obtain less advantageous PPP loans at other banks).

192. *See, e.g., id.* (class action complaint); *see also* Complaint for Plaintiff at 4, *Karen's Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, complaint filed, 2020 WL 2754919 (S.D. Cal. May 22, 2020) (class action complaint).

193. *See, e.g.,* 2020 SEC WELLS FARGO 10-Q REP. at 123, <https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/sec-filings/2020/second-quarter-10q.pdf> (reporting in its quarterly report that Wells Fargo is increasingly facing lawsuits related to its participation in PPP, such as class action lawsuits brought by agents of the borrowers).

borrowers in submitting their loan applications.<sup>194</sup> One common law theory that frequently grounds those types of claims is unjust enrichment.<sup>195</sup> Class action lawsuits have also surfaced in this context.<sup>196</sup>

Although PPP lenders may be held liable to denied applicants and agents, the likelihood of lender liability is low for three reasons. First, courts are unlikely to allow class action lawsuits to proceed,<sup>197</sup> thus reducing the higher likelihood of recovery that plaintiffs typically enjoy in class action lawsuits.<sup>198</sup> Second, plaintiffs have a low likelihood of recovery on the most frequent ongoing common law claims of intentional interference with prospective economic advantage and negligence brought by denied applicants.<sup>199</sup> Third, plaintiffs have a low likelihood of recovery on agents' common law claim of unjust enrichment.<sup>200</sup>

*A. Limited Likelihood of Success for Class Action Lawsuits*

Courts are unlikely to allow class action lawsuits to proceed. Denied applicants and agents are unlikely to satisfy the prerequisites which courts require for class action lawsuits. Under the Federal Rules of Civil Procedure, one prerequisite for class action lawsuits is that there must be a class representative that can adequately represent the interests of a class,<sup>201</sup> known as the “adequacy” requirement.<sup>202</sup> A class representative can satisfy the adequacy requirement when he or she

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194. *See, e.g.,* Juan Antonio Sanchez, PC v. Bank of South Tex., 2020 WL 6060868 (S.D. Tex. Oct. 14, 2020) (involving claims of unjust enrichment brought against a PPP lender).

195. *See, e.g., id.* (dismissing an agent's claim involving unjust enrichment against a PPP lender); *see also* Johnson v. JPMorgan Chase Bank, No. 20-CV-4100 (JSR), 2020 WL 5608683 (S.D.N.Y. Sept. 21, 2020) (involving an agent's claim of unjust enrichment); *see also* Steven L. Steward & Assocs., P.A. v. Truist Bank, No. 620CV1083ORL40GJK, 2020 WL 5939150 (M.D. Fla. Oct. 6, 2020) (involving an agent's claim of unjust enrichment).

196. *See* Complaint for Plaintiff at 7, Panda Group, PC v. Bank of America, C.D. Utah (2020) (No. 4:20-cv-00045-DN) (providing an example of a class action complaint brought by a group of agents).

197. *See infra* Part IV.A.

198. *Class Action Lawsuits Seem Good But Have a Lot of Drawbacks that Don't Make Them Very Ideal*, NORTH CAROLINA CONSUMERS COUNCIL (Mar. 18, 2020), <https://www.nccconsumer.org/news-articles-eg/class-action-lawsuits-sound-like-a-good-thing-but-they-arent-always-that-great-for-you.html> [<https://perma.cc/9UPA-F25Q>] (“When many plaintiffs with the same issue combine together to form a class, each person has a better chance of recovering compensation when they may not have been able to do as individuals.”).

199. *See infra* Part IV.B.

200. *See infra* Part IV.C.

201. Fed. R. Civ. P. 23(a)(4).

202. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 267 (2d Cir. 2006).

possesses the same interest and suffers the same injury as the class members.<sup>203</sup> Another prerequisite is that there must be enough common questions of fact underlying the claims of each plaintiff in the class.<sup>204</sup> Some common law claims naturally do not involve enough common questions of fact, such as claims of unjust enrichment.<sup>205</sup>

Here, plaintiffs who are denied PPP applicants cannot satisfy the adequacy requirement. Denied applicants cannot satisfy this requirement because they do not possess the same interest or suffer the same injury as the rest of the prospective class.<sup>206</sup> For example, the facts pleaded in a class action complaint brought against JP Morgan Chase (“Chase”) bank suggested that the denied applicants did not all possess the same interest because each applicant needed different loan amounts.<sup>207</sup> Furthermore, the PPP applicants did not suffer the same injury because each applicant’s potential economic loss would vary depending on the size of their business.<sup>208</sup>

Moreover, courts are unlikely to grant a class certification for agents because their common law claims do not share enough common questions of fact.<sup>209</sup> For example, *Sport & Wheat, CPA, PA v. ServisFirst Bank, Inc.*<sup>210</sup> prevented certification of a class of agents in part because

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203. *E. Tex. Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (“As this Court has repeatedly held, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.”).

204. Fed. R. Civ. P. 23(a)(2).

205. *See Sport & Wheat, CPA, PA v. ServisFirst Bank, Inc.*, 2020 WL 4882416 at fn. \*14 (N.D. Fla. Aug. 17, 2020) (Dkt. #57) (describing how the common law claim of unjust enrichment is not adept for class action certification); *see also Vega v. T-Mobile, USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009) (“[C]ommon questions will rarely, if ever, predominate an unjust enrichment claim, the resolution of which turns on individualized facts.”).

206. *C.f. Profiles, Inc. v. Bank of America Corp.*, 453 F. Supp. 3d 742, 754 (D. Md. Apr. 13, 2020) (describing denied PPP applicants as generally suffering different injuries because the reasons for why applicants are denied may be different).

207. *See* Complaint for Plaintiff at 18, *Sha-Poppin Gourmet Popcorn LLC v. JPMorgan Chase Bank, N.A.*, No. 1:20-cv-02523 (N. Ill. Apr. 24, 2020) (pleading facts that Sha-Poppin would be able to keep its business open for a fraction of an eight-week window by acquiring a loan of \$6,000, whereas Hawkins-Armstrong would not be able to do so with that same loan amount).

208. *See id.* (admitting in class action complaint that Sha-Poppin would be able to survive for part of an eight-week time window with a small loan of \$6,000, unlike Hawkins-Armstrong which suffered a much greater injury by receiving the same loan amount but did so anyways because it was “desperate”).

209. *See Sport & Wheat, CPA, PA v. ServisFirst Bank, Inc.*, 2020 WL 4882416 at \*fn. 14 (N.D. Fla. Aug. 17, 2020) (describing that common questions of fact are rarely found in unjust enrichment claims).

210. 2020 WL 4882416 (N.D. Fla. Aug. 17, 2020).

the underlying unjust enrichment claim did not involve common questions of fact.<sup>211</sup> There were no common questions of fact because each agent pursued different damages from the PPP lender and the lender had different knowledge for whether applications were submitted with an agent's help.<sup>212</sup>

Courts are also unlikely to allow class action lawsuits to proceed because they will most likely compel resolution of those claims in arbitration, a process that is frequently more favorable banks.<sup>213</sup> The threshold question for determining whether a claim is arbitrable is typically one for the court to decide unless both parties unambiguously agree that only an arbitrator can make that determination.<sup>214</sup> The majority of courts consider that the express incorporation of American Arbitration Rules in a contract is indicative of this unambiguous agreement.<sup>215</sup> For

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211. *See id.* (explaining that unjust enrichment claims rarely, if ever, involve common questions of fact).

212. *See id.* (implying that there were not enough common questions of fact on the agents' claim of unjust enrichment presumably because two components of that unjust enrichment claim—that the lender had knowledge of the agents helping applicants and caused damages—did not involve enough common questions of fact).

213. *See* Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. 233, 244–245 (2019) (discussing that companies often use the arbitration process by including one-sided terms in arbitration clauses of contracts that benefit the company, such as terms that require arbitration to take place in only one location or that claims must be brought within a very short period of time); *see also* Jessica Silver-Greenberg and Michael Corkery, *In Arbitration, a "Privatization of the Justice System,"* N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [<https://perma.cc/Q8EW-5BBV>] (examining records of over 25,000 arbitration cases between 2010 and 2014 to conclude that the arbitration process is “a rigged system of expediency” that often favors the businesses like banks that add an arbitration clause to the contract, because arbitrators feel the need to rule on behalf of them to retain their business).

214. *See, e.g.,* *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942–46 (1995) (holding that parties are presumed not to have agreed to arbitrate questions of arbitrability unless the parties clearly and unmistakably agree to submit arbitrability questions to arbitration); *see also* *Crawford Profl Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 261 (5th Cir. 2014) (“[I]f the parties have clearly and unmistakably agreed to arbitrate arbitrability, certain threshold questions—such as whether a particular claim is subject to arbitration—are for the arbitrator, and not a court, to decide.”).

215. *See, e.g.,* *Apollo Comput., Inc. v. Berg*, 886 F.2d 469, 473–74 (1st Cir. 1989) (holding that parties agreeing to have all disputes resolved according to the International Chamber of Arbitration rules, which are similar to the American Arbitration Rules, constitutes “clear and unmistakable” evidence that the parties decided to arbitrate arbitrability); *see also* *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (“[W]hen . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator.”); *see also* *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*,

example, *DNM Contracting, Inc. v. Wells Fargo Bank*<sup>216</sup> compelled arbitration for a PPP applicant's claims in part because of Wells Fargo's express incorporation of American Arbitration Rules in contracts which applicants agreed to when applying for new business accounts to receive PPP loans.<sup>217</sup>

Like Wells Fargo, many PPP lenders have incorporated the American Arbitration Rules in contracts which applicants must agree to when applying for PPP loans.<sup>218</sup> Therefore, courts will similarly compel applicants' claims against PPP lenders to be resolved in arbitration because many PPP lenders have incorporated those rules into agreements with PPP applicants.<sup>219</sup> But even when assuming that plaintiffs successfully certify a class for a class action, banks will have limited liability exposure to both PPP applicants<sup>220</sup> and agents.<sup>221</sup>

*B. Limited Likelihood of Lender Liability to PPP Applicants*

PPP lenders have limited lender liability exposure to applicants. Plaintiffs are unlikely to succeed on the merits of the two common law claims based in tort that are most frequently raised against PPP lenders—

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687 F.3d 671, 675 (5th Cir. 2012) (joining sister circuits that the “express adoption” of the American Arbitration Rules constitutes “clear and unmistakable” evidence that the parties agreed to arbitrate arbitrability); *see also* *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (“[W]e conclude that the arbitration provision’s incorporation of the AAA Rules . . . constitutes a clear and unmistakable expression of the parties’ intent to leave the question of arbitrability to an arbitrator.”).

216. No. 4:20–CV–1790 (S.D. Tex. 2020).

217. *DNM Contracting, Inc. v. Wells Fargo Bank*, No. 4:20–CV–1790 (S.D. Tex. 2020) (“Because the Arbitration Agreement expressly incorporates AAA rules, the Court finds “clear and unmistakable evidence” that the parties agreed to arbitrate arbitrability.”).

218. *See, e.g.*, Online Services Agreement, JP MORGAN CHASE (May 20, 2018), <https://www.chase.com/content/dam/mobile/en/legacy/documents/legal-docs/COLSA2.pdf> [<https://perma.cc/6F9J-HY6M>] (“The party filing a Claim(s) in arbitration must file its Claim(s) before JAMS or the American Arbitration Association under the rules of such arbitration administrator in effect at the time the Claim(s) was filed. Rules and forms may be obtained from, and Claims made may be filed with JAMS (800.352.5267 or [jamsadr.com](https://jamsadr.com)) or the American Arbitration Association (800-778-7879 or [www.adr.org](https://www.adr.org)).”).

219. *See, e.g.*, *Deposit Account Agreement*, WELLS FARGO (Nov. 9, 2020), <https://www.wellsfargo.com/fetch-pdf?formNumber=CCB2018C&subProductCode=ANY> [<https://perma.cc/C3LB-ZZWZ>] (“Wells Fargo and you each agree that the arbitration will: Proceed in a location mutually agreeable to Wells Fargo and you, or if the parties cannot agree, in a location selected by the American Arbitration Association (AAA) in the state whose laws govern your account.”).

220. *See infra* Part IV.B.

221. *See infra* Part IV.C.



intentional interference with prospective economic advantage and negligence.<sup>222</sup> Both common law claims are grounded on PPP lenders' purported prioritization of existing customers instead of processing loan applications on a "first come, first served" basis.<sup>223</sup> One notable difference is that intentional interference with prospective economic advantage is centered on a plaintiff's loss of an expected result,<sup>224</sup> whereas negligence speaks to the reasonableness of the defendant's underlying conduct.<sup>225</sup> Ultimately plaintiffs are unlikely to succeed on these common law claims, and therefore PPP lenders may deal first with their existing customers when processing PPP loan applications.

*Sha-Poppin Gourmet Popcorn LLC v. Chase*<sup>226</sup> is an example of an ongoing lawsuit under the theory of intentional interference with prospective economic advantage and arises under Illinois common law.<sup>227</sup> Finding lender liability on that theory in Illinois depends on whether the following elements are satisfied: (1) the existence of a valid business relationship or expectancy; (2) the defendants' knowledge of the plaintiff's business expectancy; (3) purposeful interference by the defendants that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship or termination of the relationship; and (4) damages to plaintiff resulting from such interference.<sup>228</sup>

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222. See, e.g., Complaint for Plaintiff at 26–27, *Sha-Poppin Gourmet Popcorn LLC v. JPMorgan Chase Bank, N.A.*, No. 1:20-cv-02523 (N. Ill. Apr. 24, 2020) (claiming that Chase bank is liable under the theory of intentional interference with prospective advantage).

223. See *id.* (contending that Chase intentionally interfered with the plaintiff's business expectancy of receiving a PPP loan by purposely prioritizing existing customers and not processing loan applications on a first come, first serve basis); see also Response Brief at 12–13, *Karen's Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, complaint filed, 2020 WL 2754919 (S.D. Cal. May 22, 2020) (arguing that Wells Fargo negligently implemented the PPP).

224. See *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill.2d 460, 484, 693 N.E.2d 358, 380 (1998) (providing the four elements of the tort of intentional interference with prospective economic advantage in which all four elements relate to whether the plaintiff had a valid business expectancy).

225. See Cal. Civ. Code § 1714(a) (providing a rationale for negligence lawsuits as incentivizing everyone to be conscious of exercising "ordinary care" when managing their property or person to prevent injuries to himself or others).

226. Complaint, *Sha-Poppin Gourmet Popcorn LLC v. JPMorgan Chase Bank, N.A.*, No. 1:20-cv-02523 (N. Ill. Apr. 24, 2020).

227. See *id.* (bringing a lawsuit against a PPP lender in the Northern District Court of Illinois).

228. *Gleason*, at 484, 693 N.E.2d at 380 (defining the elements of intentional interference with economic advantage in Illinois common law).



For a plaintiff to satisfy the first element, the pattern in Illinois and other states' case law is the fact that the defendant has interfered with the business expectancy the plaintiff had with a third party who is not subject to the underlying claim.<sup>229</sup> A party can show the existence of a valid business expectancy with a third party when there is a reasonable likelihood that the expectancy will actually occur.<sup>230</sup> For example, a valid business expectancy could be receiving financing from a lender.<sup>231</sup> In *Trepel v. Pontiac Osteopathic Hosp.*,<sup>232</sup> the claimant adequately pleaded that there was a reasonable likelihood of their expectancy to receive a government loan on time to actually occur, but the opposing party's interference prevented that expectancy from coming into fruition.<sup>233</sup> The hospital had pleaded that, although their loan application met the statutory criteria for loan approval, and the lender had already approved their loan, the doctor delayed the lender's ability to provide it by filing complaints describing the hospital's defects to state agencies.<sup>234</sup>

Determining whether a plaintiff has satisfied the second element—defendant's knowledge of the plaintiff's business expectancy—is fairly straightforward.<sup>235</sup> Like the first element, Illinois

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229. See, e.g., *Dowd and Dowd, Ltd. v. Gleason*, 352 Ill.2d 365, 382–383, 816 N.E.2d 754, 769 (Ill. App. 2004) (holding that the defendant law firm prevented the plaintiff attorney, a fired attorney from that firm, from having third party Allstate as a client by improperly inducing Allstate to stop doing business with plaintiff attorney); see also *Trepel v. Pontiac Osteopathic Hosp.*, 135 Mich. App. 361, 377–378, 354 N.W.2d 341, 348 (Mich. App. 1984) (holding that the defendant hospital adequately pleaded the tort of intentional interference with economic advantage against the counter-defendant doctor who interfered with the hospital's ability to receive financing from a third party).

230. See, e.g., *Anderson v. Vanden Dorpel*, 172 Ill.2d 399, 407–408, 667 N.E.2d 1296, 1299–1300 (Ill. 1996) (explaining that there is no reasonable likelihood that the plaintiff's expectancy of receiving a job offer would actually occur because merely receiving good references and comments of being a “leading candidate” and “seriously considered” for the job are not guarantees but simply informal assurances of good will).

231. See *Trepel*, at 377–378, 354 N.W.2d at 348 (discussing the existence of a valid business expectancy for a loan where a lender such as the Michigan State Hospital Finance Authority approves of a loan in advance).

232. 135 Mich. App. 361, 354 N.W.2d 341 (1984).

233. See *id.* (holding that the hospital adequately pled in their counterclaim that there was a reasonable expectation that their bond would be approved).

234. See *id.* (describing that a trier of fact could reasonably conclude from the facts of the defendant's counterclaim that the Michigan State Hospital Finance Authority had a reasonable likelihood of approving the defendant's bond).

235. See, e.g., *Dowd and Dowd, Ltd. v. Gleason*, 352 Ill.2d 365, 382, 816 N.E.2d 754, 769 (Ill. App. 2004) (reasoning in one brief sentence how the second element of the tort of intentional interference with economic advantage is satisfied).

courts focus on whether the defendant has knowledge of the plaintiff's business expectancy with a *third party*.<sup>236</sup>

Additionally, Illinois courts have established a test to determine whether the third and fourth elements are satisfied.<sup>237</sup> More specifically, the plaintiff must prove that the defendant not only took the action to intentionally interfere with the plaintiff's business expectancy, but also acted with the *purpose* to harm the plaintiff's business.<sup>238</sup> What is more, Illinois courts find that the third element is not satisfied when the defendant can identify a reasonable purpose for his or her action that is not harming the plaintiff's expectancy.<sup>239</sup> Finally, Illinois law requires plaintiffs to show for the fourth element that the damages they received are not speculative but can be attributable to the defendant's conduct "to a reasonable degree of certainty."<sup>240</sup>

Based on this case law, the plaintiffs in *Sha-Poppin* have described in their complaint that all four elements can be satisfied.<sup>241</sup> The plaintiffs argue that the first element can be satisfied because PPP applicants had a valid business expectancy to receive financing "that was critical to their survival during the COVID-19 pandemic."<sup>242</sup> In fact, the plaintiffs believe that there was a reasonable likelihood that this

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236. *See id.* ("Dowd enjoyed a 15-year business relationship with Allstate. As partners and shareholders, defendants were undeniably aware of this relationship and its lucrative benefit to Dowd."); *see also* *Bullet Express, Inc. v. New Way Logistics, Inc.*, 70 N.E.3d 251, 264, 410 Ill.Dec. 434, 447 (2016) (describing how the defendant knew of the "longstanding relationship" between plaintiff and third party).

237. *See, e.g.,* *Atanus v. American Airlines, Inc.*, 403 Ill. App. 3d 549, 557, 932 N.E.2d 1044, 1051 (2010) ("[P]laintiff must establish facts indicating that the defendants acted with the aim of interfering with plaintiff's expectancy.").

238. *See, e.g.,* *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill.2d 460, 485, 693 N.E.2d 358, 371 (1998) ("[A] plaintiff must show not merely that the defendant has succeeded in ending the [business] relationship or interfering with the [business] expectancy, but "purposeful interference"—that the defendant has committed some impropriety in doing so.").

239. *See, e.g.,* *Atanus*, at 557–558, 932 N.E.2d at 1051 (stating that the defendant employer shared information on plaintiff employee's work hours with another employer of plaintiff for the reasonable purpose of determining whether employee was working for both employers at the same time, not to get employee fired).

240. *See, e.g.,* *Dowd and Dowd*, at 383, 816 N.E.2d at 770 ("A plaintiff must prove damages to a reasonable degree of certainty, and evidence cannot be remote, speculative, or uncertain.").

241. *See, e.g.,* Complaint at 27, *Sha-Poppin Gourmet Popcorn LLC v. JPMorgan Chase Bank*, No. 1:20-cv-02523 (N. Ill. Apr. 24, 2020) (stating a claim that all four elements of tortious interference with prospective economic advantage can be satisfied).

242. Complaint at 27, *Sha-Poppin Gourmet Popcorn LLC v. JPMorgan Chase Bank*, No. 1:20-cv-02523 (N. Ill. Apr. 24, 2020).

expectancy would have actually occurred if Chase had reviewed their PPP loan applications according to the PPP's requirement to review on a "first come, first serve basis"<sup>243</sup> rather than "systematically prioritize[] larger and more prestigious commercial clients over Plaintiffs."<sup>244</sup> The plaintiffs then purport to show the defendant's knowledge of a plaintiff's business expectancy to satisfy the second element, stating that Chase had knowledge of the applicants' business expectancy when agreeing to the requirements of the PPP and accepting PPP loan applications from borrowers.<sup>245</sup>

The plaintiffs in *Sha-Poppin* then argue that the third element is satisfied by showing that the bank acted with the purpose to interfere with the applicants' expectancy by favoring applicants of commercial clients.<sup>246</sup> By favoring other customers, the argument continues that the fourth element is satisfied because Chase's interference proximately caused damage to the borrowers that is not speculative because the borrowers had to obtain loans at other banks based on conduct directly attributable to Chase's failure to properly processing their applications.<sup>247</sup> The applicants believe that they would have received much needed PPP loans sooner if Chase had properly processed their loan applications on a first come, first serve basis.<sup>248</sup>

Applying this case law to the facts pleaded in the complaint of *Sha-Poppin*, the complaint's analysis of the four elements is most likely incorrect. The plaintiffs probably cannot satisfy the first element by showing that they have a valid business expectancy to receive PPP loans

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243. See, e.g., Complaint at 26-27, *Sha-Poppin Gourmet Popcorn LLC v. JPMorgan Chase Bank, N.A.*, No. 1:20-cv-02523 (N. Ill. Apr. 24, 2020) (alleging in lawsuit that JP Morgan Chase misrepresented the loan eligibility for their PPP loans, allowing PPP borrowers to believe that they would have their PPP loans reviewed on a first come, first serve basis).

244. *Id.* at 27.

245. See *id.* at 26-27 ("Defendant Chase was aware of the expectancy, to the extent it received a PPP loan application from Plaintiff and the putative Class or otherwise had direct and specific knowledge that they intended to apply for a PPP loan.").

246. *Id.* at 26-27 ("Defendant Chase intentionally interfered in Plaintiff's and the putative Class' prospective business by allowing other PPP loan applicants to cut in front of them in the application line, and indeed, by systematically prioritizing larger and more prestigious commercial clients over Plaintiff and the putative class.").

247. See *id.* at 27 (alleging that as a proximate cause of JPMorgan Chase Bank's conduct, the plaintiffs were not able to obtain PPP loans from that bank and instead had to obtain smaller PPP loans from other banks).

248. See *id.* at 27 ("As a proximate result of Chase's misconduct, Plaintiff and the putative class were not able to obtain PPP loans they otherwise were qualified to receive, or were only able to obtain much smaller loans elsewhere.").

from Chase. In this case, unlike the case law, the plaintiffs lack a business expectancy with a third party. In *Trepel*, the claimant adequately pleaded a valid business expectancy with a lender that was not subject to the claim, and that expectancy would have actually occurred if the opposing party had not interfered.<sup>249</sup> By contrast, here the PPP applicants have stated their claim against Chase who is the opposing party itself, not a third party.

Even assuming that a plaintiff does not need to state a valid business expectancy with a third party, the plaintiffs fail to state a valid business expectancy. The claimants in *Trepel* had a valid business expectancy to receive a loan because their loan had already been approved and was simply delayed due to the opposing party's conduct.<sup>250</sup> But here, although many of the PPP loan applications were denied despite meeting the statutory criteria,<sup>251</sup> Chase had not guaranteed the acceptance of any particular PPP loan application.<sup>252</sup> Furthermore, Chase had not even guaranteed that it would process any application.<sup>253</sup> Because the plaintiffs do not state a claim against a third party, the plaintiffs most likely cannot satisfy the first element.

For the second element, plaintiffs cannot show that Chase had knowledge of the plaintiff's business expectancy to receive a PPP loan application. Although a lender may infer from a loan application that an applicant wishes to receive the loan, a lender cannot infer that the applicants are guaranteed a loan. The plaintiffs' claim shares a similar flaw in their reasoning of the first element—reasoning that a business

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249. See *Trepel v. Pontiac Osteopathic Hosp.*, 135 Mich. App. 361, 377–378, 354 N.W.2d 341, 348 (1984) (holding that the defendant hospital adequately pled in their counterclaim that there was a reasonable expectation that their bond would be approved).

250. See *id.* (describing that a trier of fact could reasonably conclude from the facts of the defendant's counterclaim that the Michigan State Hospital Finance Authority had a reasonable likelihood of approving the defendant's bond).

251. See Complaint at 27, *Sha-Poppin Gourmet Popcorn LLC v. JPMorgan Chase Bank*, N.A., No. 1:20-cv-02523 (N. Ill. Apr. 24, 2020) (stating that the PPP applications that were denied would have otherwise been accepted, therefore implying that the applications met the PPP statutory criteria).

252. See *Paycheck Protection Program and Chase Business Bank: Frequently Asked Questions*, <https://recovery.chase.com/cares1/ppp-faqs1> (last visited Dec. 6, 2020) [<https://perma.cc/6JDX-2GKS>] (answering on a frequently asked questions page that many PPP applications were denied because of the huge volume of applications).

253. See Complaint at 27, *Sha-Poppin Gourmet Popcorn LLC v. JPMorgan Chase Bank*, N.A., No. 1:20-cv-02523 (N. Ill. Apr. 24, 2020) (stating that Chase bank was unable to process all PPP loan applications during the first round of PPP funding because of the huge volume of applications).

expectancy with the defendant is the legal equivalent of a business expectancy with a third party.<sup>254</sup> Therefore, the plaintiffs cannot satisfy the second element.

Moreover, the plaintiffs cannot show that the defendant purposely interfered with the plaintiffs' business expectancy to satisfy the third element. The PPP borrowers cannot prove that defendant Chase acted with the purpose to harm the plaintiff's expectancy because Chase can identify a valid purpose for their action.<sup>255</sup> Indeed, Chase most likely processed PPP loan applications with the purpose of processing loans as fast as possible.<sup>256</sup> In fact, processing PPP loan applications as fast as possible was one of the critical aims of the PPP.<sup>257</sup>

The plaintiffs are also unlikely to satisfy the fourth element, proving that damages resulted from Chase's particular conduct. In the complaint, the plaintiffs could have only referenced aggregate SBA data showing the value of PPP loans that lenders approved.<sup>258</sup> Accordingly, the applicable law calls for no damages to be awarded because the only available evidence illustrates PPP lenders' conduct overall, not Chase's particular conduct.<sup>259</sup> Because neither the fourth element nor any of the previous elements can be satisfied, the plaintiffs in *Sha-Poppin* are unlikely to recover on the theory of intentional interference with prospective economic advantage.

Another claim facing PPP lenders arises under the theory of negligence.<sup>260</sup> *Karen's Custom Grooming LLC v. Wells Fargo & Co.*<sup>261</sup>

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254. *See id.* (alleging that the defendant, Chase, interfered with the applicants' expectancy to receive PPP loans from Chase but not a third party).

255. *See* Waters, *supra* note 28 (describing the involvement of the private sector for PPP lending).

256. *See id.* (describing the involvement of the private sector for PPP lending).

257. *See id.* (describing the involvement of the private sector for PPP lending).

258. *See* Response Brief at 12–13, *Karen's Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, complaint filed, 2020 WL 2754919 (S.D. Cal. May 22, 2020) (criticizing a plaintiff's complaint in a different lawsuit for only citing to aggregate SBA data, making proving damages too speculative).

259. *See* Paycheck Protection Program (PPP) Rep., [https://www.sba.gov/sites/default/files/2020-08/PPP\\_Report%20-%202020-08-10-508.pdf](https://www.sba.gov/sites/default/files/2020-08/PPP_Report%20-%202020-08-10-508.pdf) (Aug. 8, 2020) [<https://perma.cc/ZU2N-H486>] (providing aggregate data on PPP lenders through August 8, 2020).

260. *See* Response Brief at 12–13, *Karen's Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, complaint filed, 2020 WL 2754919 (S.D. Cal. May 22, 2020) (responding to a complaint alleging negligence of a PPP lender).

261. *See* *Karen's Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, complaint filed, 2020 WL 2754919 (S.D. Cal. May 22, 2020).

is a claim that arises under California common law.<sup>262</sup> Claims of negligence under California common law succeed when the following elements are satisfied: “(1) the defendant owes a duty to the plaintiff, (2) the defendant breached this duty, this breach proximately caused the damage to the plaintiff, and (3) there is a compensable recovery that can be awarded to the plaintiff.”<sup>263</sup>

Although California courts typically do not impose a duty on lenders in a lender-borrower relationship above an arms-length relationship,<sup>264</sup> courts have taken the position that lenders have both a statutory and a common law duty in certain circumstances.<sup>265</sup> California has only one statute that imposes a duty on a lender, which is a fiduciary duty to the borrower when acting as a mortgage broker.<sup>266</sup> Federal statutes can only impose a duty when there is an implied private right of action.<sup>267</sup>

Moreover, a common law duty may be imposed on lenders when two scenarios are present: (1) when the lender in a transaction acts as more than “a mere lender of money,” such as by pressuring the borrower to enter into a loan agreement or by being actively involved in the financial enterprise at issue, or (2) while being “confined to their traditional scope,” a duty exists for a lender under *Biankanja v. Irving*<sup>268</sup>

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262. See Response Brief at 12–13, *Karen’s Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, complaint filed, 2020 WL 2754919 (S.D. Cal. May 22, 2020) (responding to a complaint alleging negligence of a PPP lender under California common law).

263. *Lueras v. BAC Home Loan Servicing, LP*, 221 Cal. App. 4th 49, 62 (2013); see also Cal. Civ. Code § 1714(a) (“[E]veryone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.”).

264. *Id.*

265. See, e.g., *Alvarez v. BAC Home Loans Servicing, LP*, 228 Cal. App. 4th 941, 944 (2014) (explaining that a lender may owe a duty to a borrower not to negligently handle a loan modification application).

266. See Cal. Civ. Code § 2923.1(a) (2010) (“A mortgage broker providing mortgage brokerage services to a borrower is the fiduciary of the borrower . . .”).

267. See, e.g., *Texas & P. Ry. Co. v. Rigsby*, 241 U.S. 33, 37 (1916) (articulating that common law provided an injured railroad employee with a cause of action against his employer for negligence and a federal statute provided the duty of care for the negligence claim because the plaintiff was within a class of people that the statute was intended to benefit).

268. 49 Cal. 2d 647 (1958).

based on application of its six-factor test.<sup>269</sup> The six factors are (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to him; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm.<sup>270</sup>

The common thread weaving through the fabric of the California case law for determining whether a duty is present is whether the lender has already accepted the borrower's loan application.<sup>271</sup> Once the lender has accepted the application, a legally cognizable lender-borrower relationship is established.<sup>272</sup> *Nymark v. Heart Federal Savings & Loan Association*<sup>273</sup> held that the bank did not act as more than a mere lender of money in part because the lender had not accepted the borrower's loan application at the time of the alleged negligent action.<sup>274</sup> The borrower had complained that the lender inaccurately appraised the borrower's collateral for the loan before accepting the borrower's application, but the appraisal occurred a step before accepting the loan.<sup>275</sup>

This pattern in case law on determining whether a duty is present has continued in other states during the ongoing PPP litigation.<sup>276</sup> For example, *Profiles v. Bank of America*<sup>277</sup> held that "the PPP 'does not

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269. See *Nymark v. Heart Federal Savings & Loan Ass'n*, 231 Cal. App. 3d 1089, 1096, 1098 (1991) (specifying the general rule that "a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money," and citing the six factors of *Biankanja*).

270. *Id.*

271. See, e.g., *id.* (explaining that the lender had already approved the borrower's loan application and was sued for doing an incorrect appraisal); see also *Alvarez v. BAC Loans Servicing, LP*, 228 Cal. App. 4th 941, 945-52 (2014) (holding that the lender had a duty to not negligently handle the loan modification process, which requires the lender to have approved the loan application in the first place).

272. *Id.*

273. 231 Cal. App. 3d 1089 (1991).

274. See, e.g., *Nymark*, at 1096-1097 (holding that the lender did not act as more than a mere lender of money).

275. See, e.g., *id.* (describing the bank's actions as using the appraisal to merely determine whether the borrower's collateral was adequate).

276. *C.f.*, e.g., *Profiles, Inc. v. Bank of America Corp.*, 453 F. Supp. 3d 742, 757 (D. Md. Apr. 13, 2020) (holding that PPP lenders are not required to process loan applications on a first come, first serve basis, presumably in part because there is no duty until the lender has accepted the borrower's loan application).

277. 453 F. Supp. 3d 742.



constrain banks' in 'deciding from whom to accept applications, or in what order to process applications [they] accept[.]'.”<sup>278</sup> The defendant, Bank of America, had not accepted the loan applications of the plaintiffs that brought the negligence claims.<sup>279</sup> Therefore, there is most likely no common law duty for PPP lenders to process PPP loan applications on a “first come, first served” basis because a lender’s duty does not trigger until at least the acceptance of the borrower’s loan application.<sup>280</sup> For this reason, PPP lenders may deal first with their existing customers.

Once a plaintiff has established the duty element, the plaintiff must satisfy the second element; that the defendant breached its duty and that this breach proximately caused damages to the plaintiff.<sup>281</sup> A defendant breaches his or her duty by acting in a manner that falls below the standard of ordinary care in the management of the person or property.<sup>282</sup> When the defendant violates the standard of care established by statute, California courts presume “negligence per se,” meaning that the breach of duty element is satisfied.<sup>283</sup> To determine whether the lender’s breach of conduct proximately caused damages to the borrower, California uses a “substantial factor” test.<sup>284</sup> Determining whether the lender’s breach was a substantial factor in causing damages to the borrower is a question of fact typically resolved by a jury.<sup>285</sup>

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278. *Id.* at 752–53.

279. *See id.* at 745 (explaining that plaintiffs were “unable to successfully apply for a PPP loan”).

280. *See id.* (holding that PPP lenders are not required to process loan applications on a first come, first serve basis, presumably in part because there is no duty until the lender has accepted the borrower’s loan application).

281. *Lueras v. BAC Home Loan Servicing, LP*, 221 Cal. App. 4th 49, 62 (2013).

282. Cal. Civ. Code § 1714(a).

283. *See Jacobs Farm/Del Cabo, Inc. v. Western Farm Serv., Inc.*, 190 Cal. App. 4th 1502, 1526 (2010) (“Although compliance with the law does not prove the absence of negligence, violation of the law does raise a presumption that the violator was negligent. This is called negligence per se.”); *see also Taulbee v. EJ Distribution Corp.*, 35 Cal. App. 5th 590, 596 (2019) (“The negligence per se doctrine is codified in Evidence Code section 669, subdivision (a), under which negligence is presumed if the plaintiff establishes four elements: (1) *the defendant violated a statute, ordinance, or regulation*; (2) *the violation proximately caused death or injury to person or property*; (3) *the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent*; and (4) *the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.*’ ‘The burden is on the proponent of a negligence per se instruction to demonstrate that these elements are met.’”) (emphasis added).

284. *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 968–969 (1997).

285. *Raven H. v. Gamette*, 157 Cal. App. 4th 1017, 1029–1030 (2007).

Finally, the plaintiff must satisfy the third element, that there is a compensable recovery that can be awarded to the plaintiff.<sup>286</sup> California common law requires plaintiffs to support their claim for damages with something more than speculation or conclusory allegations.<sup>287</sup>

Purporting to apply this case law, the plaintiffs in *Karen's Custom Grooming* contend that all three elements of negligence can be satisfied.<sup>288</sup> The denied applicants argue that the first element can be satisfied because Wells Fargo owed a statutory duty under the CARES Act to process the PPP loan applications with reasonable care on a “first-come, first-served” basis.<sup>289</sup> The borrowers also believe that Wells Fargo owed a common law duty to reasonably implement the PPP and allow the timely access and submission of their PPP applications online once Wells Fargo undertook or agreed to review the borrower’s PPP applications.<sup>290</sup>

The applicants also argue that the second and third elements can be satisfied.<sup>291</sup> The applicants contend that Wells Fargo was negligent per se when violating the standard of care established by the CARES Act.<sup>292</sup> To support that point, the applicants argue that Wells Fargo failed to handle loan applications consistently with SBA regulations.<sup>293</sup> Furthermore, the plaintiffs argue that this breach of duty caused damages in the form of lost or reduced value of PPP loans that is compensable by full award of damages allowed under law.<sup>294</sup> Finally, the borrowers purport to satisfy the third element by arguing that a trial can determine the economic loss to the borrowers’ businesses.<sup>295</sup>

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286. *Lueras*, at 62.

287. *E.g.*, *Holly v. Alta Newport Hosp., Inc.*, 2020 WL 1853308, at \*6 (C.D. Cal. Apr. 10, 2020) (“[A] plaintiff must support her claim for [damages] with something more than [her] own conclusory allegations, such as specific claims of genuine injury.”).

288. *See* Complaint at 51–53, *Karen’s Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, 2020 WL 2754919 (S.D. Cal. May 22, 2020) (stating a claim of negligence against Wells Fargo).

289. Complaint at 51, *Karen’s Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, 2020 WL 2754919 (S.D. Cal. May 22, 2020).

290. *Id.*

291. *Id.* at 51–53.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

Defendant Wells Fargo has raised the defense in its response brief that plaintiffs cannot satisfy the first two elements of negligence.<sup>296</sup> Wells Fargo argues that the plaintiffs cannot satisfy the first element because California recognizes neither the purported statutory duty under the CARES Act nor the common law duty.<sup>297</sup> Additionally, Wells Fargo argues that it owed no common law duty to the PPP applicants because California common law does not impose a duty on lenders that have not accepted the borrower's loan application.<sup>298</sup> For the second element, Wells Fargo points out that the applicants failed to allege that the lender caused any damage to the individual plaintiffs, instead relying on aggregate SBA data to show injury caused by PPP lenders more generally.<sup>299</sup>

Here, the likelihood of plaintiffs' recovery under the theory of negligence in *Karen's Custom Grooming* is low because Wells Fargo's defenses regarding the first two elements will most likely succeed, and the plaintiffs will not succeed in satisfying the third element because there is no compensable recovery owed to them under law. For the first element, which asks whether a duty exists, the CARES Act and SBA regulations most likely do not impose a statutory duty on Wells Fargo to review applications on a "first come, first served" basis.<sup>300</sup> Indeed, federal statutes can only impose a duty when there is an implied private right of action, and the CARES Act does not provide plaintiffs with an implied private right of action.<sup>301</sup>

Moreover, there is unlikely to be a common law duty for Wells Fargo. Under California case law, there is no legally cognizable lender-borrower relationship between Wells Fargo and the denied applicants because Wells Fargo has not accepted their loan applications and

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296. Response Brief at 23, *Karen's Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, complaint filed, 2020 WL 2754919 (S.D. Cal. May 22, 2020).

297. *Id.*

298. *Id.*

299. *Id.*

300. *C.f.* *Profiles, Inc. v. Bank of America Corp.*, 453 F. Supp. 3d 742, 751–752 (D. Md. Apr. 13, 2020) (holding that the CARES Act does not create a private right of action and therefore private parties cannot bring lawsuits against banks for breach of the CARES Act).

301. *See id.* (holding that the CARES Act does not create a private right-of-action and therefore private parties cannot bring lawsuits against banks for breach of the CARES Act).

therefore has not engaged in a transaction with the plaintiffs.<sup>302</sup> Because no transaction has taken place, Wells Fargo is also right that California does not recognize the common law duties to reasonably implement the PPP or allow timely access to its PPP application on its website.<sup>303</sup> What is more, Wells Fargo did not act more than a mere lender of money because it never lent the money out to the plaintiffs in the first place.<sup>304</sup> Like *Nymark*, where the bank's appraisal of the borrower's collateral was a step before accepting the loan,<sup>305</sup> Wells Fargo's chosen order to process PPP loan applications was merely a step before accepting PPP loans.<sup>306</sup>

The application of the six-factor *Biankanja* test will most likely cut in favor of finding no common law duty. Arguably, the foreseeability of harm to the applicants may be high because denial of PPP loans could mean the denial of much needed capital to keep a business afloat during the pandemic.<sup>307</sup> However, there is still no duty. Indeed, no loan transaction took place,<sup>308</sup> and the degree of certainty that the borrower suffered injury is low because the injury was partly self-imposed.<sup>309</sup> Further, the closeness of the connection between Wells Fargo's and the

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302. Complaint at 51–53, *Karen's Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, 2020 WL 2754919 (S.D. Cal. May 22, 2020) (suing Wells Fargo under the theory of negligence for not accepting the plaintiffs' PPP loan applications).

303. Response Brief at 23, *Karen's Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, complaint filed, 2020 WL 2754919 (S.D. Cal. May 22, 2020).

304. *Id.*

305. See *Nymark v. Heart Federal Savings & Loan Ass'n*, 231 Cal. App. 3d 1089, 1096–1097 (1991) (describing the bank's actions as using the appraisal to merely determine whether the borrower's collateral was adequate).

306. See Response Brief at 4, *Karen's Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, complaint filed, 2020 WL 2754919 (S.D. Cal. May 22, 2020) (responding to the plaintiffs' complaint which stated that the plaintiffs were denied PPP loans).

307. See Shiloh Burgess, *Small Businesses Need PPP Loan Forgiveness to Survive pandemic*, WENATCHEE VALLEY BUS. WORLD (Aug. 1, 2020), [https://www.wenatcheeworld.com/wvbusiness/shiloh-burgess-small-businesses-need-ppp-loan-forgiveness-to-survive-pandemic/article\\_8d1dc68c-cd43-11ea-8590-d70f2622252c.html](https://www.wenatcheeworld.com/wvbusiness/shiloh-burgess-small-businesses-need-ppp-loan-forgiveness-to-survive-pandemic/article_8d1dc68c-cd43-11ea-8590-d70f2622252c.html) [<https://perma.cc/BVC7-6K6P>] (describing how small businesses need federal assistance to stay afloat during the pandemic).

308. Complaint at 51–53, *Karen's Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, 2020 WL 2754919 (S.D. Cal. May 22, 2020) (suing Wells Fargo under the theory of negligence for not accepting the plaintiffs' PPP loan applications).

309. See *Profiles, Inc. v. Bank of America Corp.*, 453 F. Supp. 3d 742, 757 (D. Md. Apr. 13, 2020) (reasoning in a case based on similar facts that nothing stopped the alleged injured plaintiffs from applying for PPP loans elsewhere after being denied by the defendant PPP lender).

applicant's conduct is low because the plaintiffs only pleaded facts regarding aggregate PPP lenders.<sup>310</sup>

Yet another reason for finding no common law duty for PPP lenders is the holding of *Profiles*. The District Court in this case held that there is no requirement for PPP lenders to process loan applications on a "first come, first served" basis.<sup>311</sup> Although *Profiles* is a decision from Maryland, it is consistent with California's *Nymark* decision because both cases find no duty for a lender based on facts in which the lender has not accepted the borrower's loan application.<sup>312</sup> Therefore, plaintiffs cannot satisfy the first element of their negligence claim.

Plaintiffs most likely cannot satisfy the second element as well because Wells Fargo most likely did not violate SBA regulations. A court may consider that the SBA regulation requiring PPP loan applications to be reviewed on a "first come, first served" basis is only applicable to the SBA.<sup>313</sup> Contrary to the plaintiffs' argument, Wells Fargo is most likely not negligent per se for violating a statute or regulation. Moreover, whether plaintiffs can satisfy proximate causation turns on questions of fact that a jury would need to resolve.<sup>314</sup> Therefore, showing proximate causation depends on whether a trier of fact believes that Wells Fargo's denial of PPP loan applications proximately caused economic harm to the plaintiffs.<sup>315</sup>

Finally, the plaintiffs cannot satisfy the third element, which requires a showing that there is a compensable recovery that can be awarded to the plaintiff under law.<sup>316</sup> Here, plaintiffs cannot support their claim for damages merely with speculation and conclusory allegations by relying on aggregate SBA data on PPP lenders.<sup>317</sup> Accordingly, Wells Fargo will most likely not be held liable on the theory of negligence.

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310. Response Brief at 23, *Karen's Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, complaint filed, 2020 WL 2754919 (S.D. Cal. May 22, 2020).

311. *See Profiles*, at 757 (holding that there is no duty for the PPP lender to process the applications on a first come, first serve basis).

312. *See Nymark v. Heart Federal Savings & Loan Ass'n*, 231 Cal. App. 3d 1089, 1096–1097 (1991) (holding that there is no duty for the lender that conducted of an appraisal of a borrower's collateral before accepting the loan application).

313. Response Brief at 12, *Karen's Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, complaint filed, 2020 WL 2754919 (S.D. Cal. May 22, 2020).

314. *Raven H. v. Gamette*, 157 Cal. App. 4th 1017, 1029–1030 (2007).

315. *Id.*

316. *Lueras v. BAC Home Loan Servicing, LP*, 221 Cal. App. 4th 49, 62 (2013).

317. Response Brief at 23, *Karen's Custom Grooming LLC v. Wells Fargo & Co. et al.*, No. 20-cv-956, complaint filed, 2020 WL 2754919 (S.D. Cal. May 22, 2020).

For the foregoing reasons, PPP lenders will most likely not be found liable to applicants on claims of intentional interference with prospective economic advantage and negligence. But the door for potential lender liability does not shut once the claims brought by denied PPP applicants fail. In fact, another set of claims brought against banks—claims brought by agents—pose potential for lender liability. However, based on the applicable case law, the plaintiffs’ likelihood of recovery on those claims are similarly low.<sup>318</sup>

C. *Limited Likelihood of Lender Liability to Agents of Borrowers*

Agents believe that they are entitled to a portion of a lender’s fees for helping applicants with their PPP application.<sup>319</sup> Agents assert this claim although most, if not all, agents in the country do not have an agreement with lenders to that effect.<sup>320</sup> In support of this argument, agents cite to a SBA regulation, stating that “[a]gent fees will be paid by the lender out of the fees the lender receives from SBA . . . [t]he total amount that an agent may collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) may not exceed” limits established by the Administrator.<sup>321</sup> Accordingly, agents read this language of the regulation to mean that they are entitled to a portion of a lender’s fees under the PPP.<sup>322</sup>

Recognizing that a court is unlikely to grant a private right of action under the CARES Act, agents seek compensation under common

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318. *See infra* Part IV.C.

319. *See* Juan Antonio Sanchez, PC v. Bank of South Tex., 2020 WL 6060868 (S.D. Tex. Oct. 14, 2020) (describing an example of a lawsuit where the borrower alleges that the bank owed the agent finder’s fees).

320. *See* Dorothy Atkins, *Big Banks Beat Suit Over Unpaid PPP Loan Fees for Now*, LAW360 (Nov. 16, 2020), <https://www.law360.com/articles/1329380/big-banks-beat-suit-over-unpaid-ppp-loan-fees-for-now>, [https://perma.cc/X2AG-YNFA] (describing how a recent putative class action lawsuit against banks brought by agents alleging negligence for failure of banks to pay agent fees is part of lawsuits around the country that are being dismissed in part because there is no contract between the banks and agents).

321. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20816 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120), [https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule\\_0.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf) [https://perma.cc/X458-EPXB].

322. *See, e.g.,* Juan Antonio Sanchez, PC, 2020 WL 6060868 at \*11 (describing an argument of agents believing they are entitled to agent fees under the language of SBA regulations).

law theories of recovery.<sup>323</sup> As of October 2020, agents have brought over fifty lawsuits around the country regarding the failure of lenders to pay agent fees.<sup>324</sup> Agents most frequently use the theory of unjust enrichment in their quest for recovery.<sup>325</sup>

The agents will most likely lose on all of their common law claims. The Relief Act has codified the recent case law that provides lenders with a bright-line rule finding no lender liability when applied.<sup>326</sup> More specifically, the Relief Act expressly agrees with the new cases that joined “the emerging consensus,” holding that “agents who assist applicants with a PPP [application] are not entitled to agent fees in the absence of an agreement with the lenders.”<sup>327</sup> In a recent case, *Juan Antonio Sanchez, PC v. Bank of South Texas*<sup>328</sup> reached this holding on theories of unjust enrichment and conversion by highlighting a common, flawed premise underlying the agent’s arguments—that the SBA regulation entitles agents to a portion of a lender’s fees.<sup>329</sup> The agent did not complete a compensation agreement, also known as Form 159,<sup>330</sup> required for agents to be paid, a requirement that was in place before the PPP and has remained in effect.<sup>331</sup> In an attempt to justify noncompliance with this requirement, the agent unsuccessfully argued that the CARES Act and applicable SBA regulations supersedes this previous

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323. See, e.g., Complaint at 16, A.D. Sims, LLC v. Wintrust Financial Corp., No. 1:20-cv-02644 (N.D. Ill. Apr. 30, 2020) (alleging common law claim of unjust enrichment).

324. See Margaret Cupples and Elizabeth Boone, *CARES Act Doesn’t Entitle Accountants to Fees for Helping Borrowers Get PPP Loans*, BRADLEY (Oct. 29, 2020), <https://www.classactiondeclassified.com/2020/10/cares-act-doesnt-entitle-accountants-to-fees-for-helping-borrowers-get-ppp-loans/> [<https://perma.cc/C976-AE5C>] (explaining how there are fifty current lawsuits pending throughout the country regarding lawsuits on banks’ failure to pay PPP agent fees).

325. See, e.g., Complaint at 16, A.D. Sims, LLC v. Wintrust Financial Corp., No. 1:20-cv-02644 (N.D. Ill. Apr. 30, 2020) (alleging common law claim of unjust enrichment); see also *Juan Antonio Sanchez, PC*, 2020 WL 6060868 (holding that the agent did not state a valid unjust enrichment claim against the PPP lender).

326. Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, H.R. 133, 116th Cong. § 340 (2020).

327. *Id.*

328. 2020 WL 6060868 (S.D. Tex. Oct. 14, 2020).

329. See *id.* at \*10 (“Largely because the PPP does not entitle plaintiffs to any portion of the lenders’ fees (absent an agreement), each of these state law claims fails and must be dismissed.”).

330. See *id.* at \*9 (“Form 159 nevertheless unambiguously provides that it must be completed when an agent is to be paid.”).

331. See 15 U.S.C. § 642 (2018) (requiring agents and lenders to agree to compensation of the agent by signing Form 159).



requirement.<sup>332</sup> *Juan Antonio Sanchez* held that the CARES Act and PPP did not alter the previous requirement to use a compensation agreement for agents to be paid.<sup>333</sup>

The Relief Act provides a bright-line rule to lenders that a written compensation agreement must be established before any payment of agent fees relating to the PPP is made.<sup>334</sup> More importantly, this procedure must be used for an agent to survive a lender's motion to dismiss on *any* common law claim.<sup>335</sup> Accordingly, Congress has made clear what courts already knew—PPP lenders have limited lender liability to agents of PPP applicants.

## V. CONCLUSION

In short, there is limited lender liability for PPP lenders.<sup>336</sup> First, courts are unlikely to certify PPP applicants or their agents in class action lawsuits, thus reducing the higher likelihood of recovery that plaintiffs typically enjoy in class action lawsuits.<sup>337</sup> Second, plaintiffs have a low likelihood of recovery on the most frequent ongoing common law claims of intentional interference with economic advantage and negligence brought by PPP applicants.<sup>338</sup> Third, plaintiffs have a low likelihood of recovery on agents' common law claim of unjust enrichment.<sup>339</sup>

Limited lender liability for PPP lenders is illustrative of the government's success in implementing the PPP.<sup>340</sup> When PPP lenders are aware that there is less risk of lender liability in programs such as the

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332. See *Juan Antonio Sanchez, PC*, 2020 WL 6060868 at \*7 (dismissing plaintiffs' argument that the PPP supersedes the previous requirement that agents do not need to complete Form 159 to be paid).

333. *Id.* at \*9.

334. Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, H.R. 133, 116th Cong. § 340 (2020).

335. See *id.* (dismissing agents' common law claims of unjust enrichment and conversion for failure to fill out Form 159).

336. See *supra* Part IV.

337. See *supra* Part IV.A.

338. See *supra* Part IV.B.

339. See *supra* Part IV.C.

340. C.f., John Detrixhe & Dan Kopf, *The PPP Was Actually a Big Success Argues an Obama-era Official*, QUARTZ (July 16, 2020), <https://qz.com/1878677/paycheck-protection-loans-had-no-job-retention-requirements/> [<https://perma.cc/6UFC-GNTX>] (interviewing a Harvard Business School Fellow Karen Mills, who lead the Small Business Administration during the Obama administration and said that although there were flaws and "bad actors" in the PPP, the program "helped literally millions of small businesses survive").

PPP, they are more likely to participate.<sup>341</sup> That participation supports the success of governmental intervention during financial crises.<sup>342</sup> Indeed, the participation of lenders in the PPP is generally seen as successful to help small businesses survive a once-in-a-century global health crisis.<sup>343</sup>

Successfully implementing the PPP required a vast governmental power that the federal government has honed in over the course of U.S. history.<sup>344</sup> That vast governmental power developed first with the creation of the Federal Reserve Board in 1913 to lend money to banks.<sup>345</sup> Subsequently, the FDIC was created to establish a strong federal safety net that protects customer's deposits at banks.<sup>346</sup> Then, the Great Recession of 2008 refined the FRB's and FDIC's authority to intervene during financial crises.<sup>347</sup> More specifically, the Dodd-Frank Act now requires federal assistance programs to use volunteer lenders and general requirements for lenders to participate.<sup>348</sup> Those statutory requirements help explain the PPP, a program that requires PPP lenders to volunteer and meet the general requirements to participate.<sup>349</sup>

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341. See Vivian Merker, Tammi Ling, Daniel Tannebaum, *PPP is a Compliance Minefield for Banks*, AM. BANKER (May 6, 2020, 9:54 AM), <https://www.americanbanker.com/opinion/ppp-is-a-compliance-minefield-for-banks> [<https://perma.cc/4NXM-ZBPT>] (describing how some banks were hesitant at first to participate in the PPP, implying that banks would be less anxious if there was a lower risk of lender liability).

342. See Press Release from Maxine Waters, *supra* note 30 (explaining that the PPP would not be successful without the participation of banks).

343. See Neil Amato, *A Product Pivot and PPP Success in the Early Days of the Pandemic*, J. OF ACCOUNTANCY (July 13, 2020), <https://www.journalofaccountancy.com/news/2020/jul/sons-liberty-coronavirus-product-pivot-ppp-success.html> [<https://perma.cc/V8LL-NFTL>] (providing an argument of why the PPP and the participation of banks in that program is widely successful).

344. See *supra* Part II.A.

345. FED. RESERVE BANK OF MINNEAPOLIS, *supra* note 68.

346. See 12 U.S.C. § 1821(a)(1)(E) (2018) (changing the “standard maximum deposit insurance amount” from \$100,000 to \$250,000, making permanent a change the FDIC exercised using its emergency powers during the 2008 Financial Crisis); see also US DEP’T OF STATE, *supra* note 66 (explaining that the creation of deposit insurance for banks, implemented by the Federal Deposit Insurance Corporation, is one of the most important regulations that exist in the U.S. banking system).

347. TROUBLED ASSET RELIEF PROGRAM, *supra* note 76.

348. 12 U.S.C. § 53 (2018).

349. See Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) § 1102, 15 U.S.C.A. § 636(a)(36)(F)(ii) (West 2021) (providing the generally applicable requirements that banks participating in PPP must implement).

Despite the successes of the PPP and the limited lender liability for PPP lenders, banks participating in the PPP have one notable drawback.<sup>350</sup> Banks face servicing liability due to the higher costs associated with keeping PPP loan portfolios on their balance sheet.<sup>351</sup> More specifically, larger banks anticipate higher servicing liability for PPP loans because they have to navigate a more complex loan forgiveness process.<sup>352</sup> Indeed, Congress's latest round of PPP funding only provides a streamlined loan forgiveness process for loans of less than \$150,000,<sup>353</sup> a loan size that is mostly held on the balance sheets of smaller banks.<sup>354</sup>

Ultimately, only the largest PPP lenders face servicing liability, and more generally, PPP lenders face limited lender liability.<sup>355</sup> While lenders participating in emergency loan programs like the PPP will never be able to completely eliminate their servicing liability, nor their liability at common law, lenders can at least understand their liability risk exposure.<sup>356</sup> No good deed goes unpunished, but the lender liability for PPP lenders is limited, which will help lenders focus on the right thing during the current financial crisis—helping the economy recover.<sup>357</sup>

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350. *See supra* Part II.B.

351. *See supra* Parts III–IV.

352. *See* Consolidated Appropriations Act of 2021 (“Relief Act”), Pub. L. No. 116–260, 134 Stat. 1182, 1993 (requiring simply a 1-page loan forgiveness application for loans of \$150,000 or less but a more complicated loan forgiveness application for loans of more than \$150,000).

353. *Id.*

354. *See* 2020 Paycheck Protection Program Rep, *supra* note 164 (providing aggregate data on PPP lenders through August 8, 2020 where the top 15 PPP lenders provided an average loan size close to or above \$150,000, with a few exceptions such as Wells Fargo).

355. *See supra* Part IV.

356. Gerald Corrigan, *Are Banks Special? A Revisitation*, FED. RESERVE BANK OF MINNEAPOLIS (Mar. 1, 2000), <https://www.minneapolisfed.org/article/2000/are-banks-special> (explains the importance of banks in the economy and breaks down the structure of banks).

357. *See id.* (explains the importance of banks in the economy and breaks down the structure of banks).

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